TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~861~~. 13

JOHN PHELPS PUTNAM, HEMAN ELY, HEMAN ELY, EXECUTOR OF C. ARTHUR ELY, DECEASED, AND STEVENSON BURKE, APPELLANTS,

vs.

THE NEW ALBANY AND SANDUSKY CITY JUNCTION RAILROAD COMPANY, THOMAS L. SMITH, JOHN S. McDONALD, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED OCTOBER 27, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 361.

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vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis on the first Tuesday in May, in the year of our Lord one thousand eight hundred and sixt'-nine, before the Honorable David McDonald, judge of the district court of the United States for the district aforesaid.

JOHN PHELPS PUTNAM, HEMAN ELY, HEMAN Ely, executor of the last will and testament of C. Arthur Ely, deceased, and Stevenson Burke,

v.

THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, the City of N. Albany, Thomas L. Smith, John D. McDonald, Jesse J. Brown, (survivor of James Brooks,) John S. Davis, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner, Horatio N. Duval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephriam L. Whistler, William Lockmiller, John Knefley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahan, Lawrence Bradley, James Montgomery, Samuel Montgomery, Asahel Claff, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Winstandly, and Jesse Brown and John B. Winstandly, executors of John Brown, deceased, and Augustus Bradley. } 1297.—Chancery.

Be it remembered that, heretofore, to wit, on the 29th day of January, A. D. 1868, the complainants herein, by Mess. Porter, Harrison, and Fishback, their solicitors, filed in the office of the clerk of said court their bill in chancery in the cause above entitled in the words and figures following, to wit:

To the honorable judges of the circuit court of the United States for the district of Indiana:

John Phelps Putnam, of the city of Boston, and a citizen and resident of the State of Massachusetts, Heman Ely, of Elyria, Lorain Co, Ohio, and a citizen and a resident of the State of Ohio, who sues and brings this bill of complaint for himself personally, and also as executor of the estate of C. Arthur Ely, late deceased, of said Elyria, who was at the time of his decease, and during his whole life, a citizen of the State of Ohio, and Stevenson Burke, a resident of Elyria aforesaid, and a citizen of the State of Ohio, bring this their bill of complaint against The New Albany and Sandusky City Junction Railroad Company, a corporation created by the laws of the State of Indiana, and having its only office and place of business therein, and being a citizen of said State of Indiana, The City of New Albany, a municipal corporation, created by the laws of the State of Indiana, and existing in the county of Floyd, in said State of Indiana, and a citizen of Indiana, Thomas L. Smith, John S. McDonald, Jesse J. Brown, survivor of James Brooks, John S. Davis, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner, Horatio N. Deval,

Thomas Danforth, Franklin Warren, William S. Culbertson, John
2 B. Crawford, Ephriam S. Whistle, William Lockmiller, John Kneffley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahan, Lawrence Bradley, residents of Floyd County, Indiana, and citizens of said State of Indiana; also James Montgomery, Samuel Montgomery, Walter Maun, Asabel Claff, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Winstandly, and Jesse Brown and John B. Winstandly, the two latter as executors of John Brown, late of New Albany, deceased, and Augustus Bradley, all of said Floyd County, and citizens of the State of Indiana, and residents thereof.

And, therefore, your orators complain and say that, on the 14th day of November, A. D. 1857, William S. Pearson, jr., and Harry Seymour, then and still of the county of Hartford, Connecticut, and then and now citizens of said State of Connecticut, by the consideration of the circuit court of the county of Floyd, and State of Indiana, as trustees for said John Phelps Putnam, Sarah Coit Day, then in full life, but since deceased, Samuel J. Andrews and his wife, Catharine D. Andrews, Rollin C. Dewitt, Elijah Dewitt, George R. Starr, Horace C. Starr, Heman Ely, C. Arthur Ely, and Augustus H. Mass, recovered a judgment against the said New Albany and Sandusky City Junction Railroad Company for the sum of fifty-four thousand eight hundred and fifty-five dollars and costs of suit taxed at one thousand fifty one and $\frac{60}{100}$ dollars; that said sum of fifty-four thousand eight hundred and fifty-five dollars was re*ceived*[overed] by said Pierson and Seymour as trustees aforesaid for the cestui que trusts aforesaid against the New Albany and Sandusky City Junction Railroad Company aforesaid, in the proportions and amount following, to wit: For the use of said John P. Putnam the sum of six thousand two hundred and ten dollars, ($6,210;) for the use of Samuel J. Andrews and wife, the sum of three thousand one hundred and five dollars, ($3,105;) for the use of said Sarah Coit Day, the sum of five thousand one hundred and seventy-five dollars, ($5,175;) for the use of said Elijah Dewitt, the sum of seven thousand two hundred and forty-five dollars, ($7,245;) for the use of Rollin C. Dewitt, the sum of five thousand one hundred and seventy-five dollars, ($5,175;) for the use of said George R. and Horace C. Starr, jointly, the sum of four thousand one hundred and forty dollars, ($4,140;) for the use of said Heman Ely, the sum of eight thousand two hundred and eighty dollars, ($8,280;) for the use of said C. Arthur Ely, fourteen thousand four hundred and ninety dollars, ($14,490;) and for the use of Augustus H. Mass, the sum of one thousand and thirty-five dollars, ($1,035.)

Your orators further say that said Sarah Coit Day, at the rendition of said judgment, and up to the time of her decease, was a resident and citizen of the State of Connecticut; that she died on or about the first day of November, A. D. 1863, and that Thomas M. Day, of Hartford, Connecticut, and a citizen of said State of Connecticut, has been duly appointed and qualified, and is now the sole executor of the estate of said Sarah Coit Day; that said Samuel J. Anderson and wife, at the rendition of said judgment, were and still are residents and citizens of said State of Connecticut; and that said Elijah Dewitt, Rollin C. Dewitt, George R. Starr, Horace C. Starr, and Augustus H. Mass, then were and still are residents and citizens of the State of Ohio.

Your orators further say that so much of said judgment as belonged to said George R. and Horace C. Starr, and was recovered for their use and benefit, has been duly assigned to and is now owned by said Heman Ely, and that so much of said judgment as was recovered

3 for the use of said Sarah Coit Day, Samuel J. Andrews and wife, Elijah Dewitt, Rollin C. Dewitt, and Augustus H. Mass, amounting to twenty-one thousand seven hundred and thirty-five dollars, ($21,735,) has been duly assigned, sold, and transferred to said Stevenson Burke, and he is now the sole owner and holder thereof.

Your orators further say that said judgment is in full force and effect, unreserved and unsatisfied, and that nothing has been paid thereon except as hereinafter specified.

Your orators further say that said judgment was recovered in a suit brought in said circuit court of Floyd County by one Victor A. Peffin, pl'ff, against said New Albany and Sundusky City Junction Railroad Company, William S. Pierson, j'r, and Harvey Seymour, trustees, and James Montgomery, John S. Davis, William M. Wier, John S. McDonald, Thomas L. Smith, John B. Windstandly, Samuel H. Patterson, Charles Bowman, Charles Howard, Sebre Howard, Charles B. Applegate, Walter Mann, and William B. Lent were defendants; that said action was brought by said Peffin to recover the amount due him upon certain bonds issued by the said railroad company, known as the real-estate bonds of said company, said real-estate bonds being all for one thousand dollars each, ($1,000,) and in all being one hundred and ten bonds of the same date and amount, all of which, by reason of a failure of the railroad company to pay the interest as it fell due thereon, fell due on the first day of July, 1857, and, by consent of the said railroad company in open court, judgment was rendered upon fifty-three of said bonds in favor of said Pierson and Seymour, as trustees for the above-named cestui que trusts for the sum of ($54,855) fifty-four thousand eight hundred and fifty-five dollars, and costs of suit; and said court then and there ordered, adjudged, and decreed that the mortgage or deed of trust executed and delivered to said Seymour and Pierson as trustees to secure the payment of said one hundred and ten bonds, should be foreclosed and the premises sold, and, after the payment of the costs of said action, the proceeds of such sale should be applied upon said judgment of fifty-four thousand eight hundred and fifty-five dollars, ($54,855,) and judgment in said action then rendered in favor of the other holders of said bonds in proportion to the amount found due each.

Your orators further say that an order of sale of said mortgaged premises was made and issued by said Floyd circuit court in accordance with the laws of the State of Indiana, and that under said order of sale all the real estate embraced in said mortgage or trust-deed was advertised and sold according to law, and the proceeds of said sale were distributed among the holders of said bonds in proportion to the amount found due to each upon said bonds, and that there was made by said sale and applied upon said judgment of fifty-four thousand eight hundred and fifty-five dollars, ($54,855,) so recovered by said trustees, only the sum of thirteen thousand three hundred and sixty-eight dollars and eighty-three cents; that the entire balance of said judgment remained due and unpaid; that return of said sale was duly made to said circuit court of Floyd County at its May term, 1858, and execution was duly awarded by said court on the 24th day of May, 1858, against said railroad company, to collect the balance due on said judgment; that said real estate was sold and proceeds applied on the 30th day of March, 1858; and that for principle and interest on said judgment of fifty-four thousand eight hundred and fifty-five dollars ($54,855) so recovered by said trustees, there was due on the 30th day of March, 1858, the sum of fifty-six thousand and eighty-nine dollars and

4 twenty-four cents, ($56,089 24,) besides costs of suit, and that after deducting from said sum so due the said sum of thirteen thousand three hundred and sixty-eight dollars and eighty-three cents, ($13,368 83,) so made from the sale of said mortgaged premises, there remains due upon said judgment so owned by your orators the sum of forty-two thousand seven hundred and twenty dollars and forty-one cents ($42,720 41) and costs, the costs and increase costs amounting to seventeen hundred and twenty-five dollars and sixty-three cents, ($1,725 63.)

Your orators further say that they have caused execution to be issued to the sheriff of said Floyd County to collect the balance of said judgment so due to them as aforesaid, which execution has been by said sheriff returned unsatisfied, and no money made thereon, and said sheriff returned that, after making due and diligent search for goods and chattels, lands and tenements, wherewith to satisfy said execution, he could find none.

Your orators further say that at the rendition of said judgment said railroad company was insolvent, and utterly unable to pay its debts, and that said railroad company has ever since been and still is utterly insolvent, and has no real or personal property, or money, wherewith to pay its debts or any part thereof.

Your orators further say that, in the years 1855 and 1856, said railroad company undertook to build its road, and performe' considerable work thereon in grading and otherwise, but that they never put any part of their road in operation, nor laid any of the track thereof, and that on or about the 30th day of April, 1857, being utterly insolvent, and having expended all its means in endeavoring to build its road, said company abandoned all further efforts to build the same and all work thereon, since which time their road-bed and right of way has been sold upon its indebtedness; and since the year 1858 the said railroad company has not kept up its organization, nor elected any new officers, but that James Montgomery, of the city of New Albany, Indiana, was the last president thereof, and still, for the purpose of closing up the business of said company, is president thereof, and Thomas L. Smith, esq., also of said New Albany, is the acting attorney of said company.

Your orators further say that said city of New Albany is indebted to said railroad company in the sum of three hundred and ninety-three thousand dollars, with interest thereon payable semi-annually at six per cent. from the first day of January, A. D. 1856, and that the principal of said indebtedness will fall due on or about the first day of January, A. D. 1874; that said indebtedness of said city of New Albany to said railroad company arose as follows: That, on the 19th day of November, 1853, the said city, by its mayor, duly subscribed to the capital stock of said railroad company the sum of four hundred thousand dollars, to be paid in six (6) per cent. bonds of said city, the bonds to draw interest payable semi-annually in the city of New York; that said city, in part payment of its said subscription of four hundred thousand dollars, ($400,000,) executed, issued, and delivered to said company two hundred bonds of one thousand dollars each, numbered from one to two hundred, inclusive; that said bonds had interest warrants or coupons attached to each for the interest at six (6) per cent. accruing thereon and payable every six months, that is to say, each of said bonds had thirty-nine coupons, of thirty dollars each coupon, and falling due respectively every six months until the bonds mature, and the bonds were and are to mature and fall due on or about the first day of January, 1874; that said two hundred bonds were delivered to said railroad

company as follows: between the 25th day of March and the
5 9th day of June, 1854, one hundred bonds, and on the first day of January, 1856, one hundred more of said bonds of $1,000 each, numbered from one hundred and one to two hundred, inclusive, all of said bonds drawing interest and bearing coupons as above mentioned, and all falling due in the year 1874; that, not having possession of said bonds, or any of them, nor being able to see them, your orators are unable to give a more definite description thereof.

Your orators further say that none of said interest has been paid, and that more than the sum of seventy thousand dollars for interest accrued upon said bonds is now due to said railroad company from said city of New Albany.

Your orators further say that said city of New Albany is also indebted to said railroad company in the sum of two hundred thousand dollars for the balance of its subscription to said capital stock, together with the interest thereon from the first day of January, A. D. 1856; that said city of New Albany has never paid said subscription, nor said bonds, nor interest, nor any part thereof, except such sums of interest as fell due before January 1, 1856, and the interest upon seven of said bonds; but that, by some pretended arrangement or compromise made between said city and said railroad company, after said railroad company became insolvent, said city obtained possession of said bonds and procured an attempted cancellation of said subscription; but which arrangement and compromise and attempted cancellation of said subscription your orators aver to be entirely null and void, and to have been made without authority of law, and they say that said indebtedness of said city to said railroad company still subsists in full force.

Your orators further say that said subscription made by said city for said four hundred thousand dollars of capital stock was legal in all respects, and that said bonds were legally issued in payment for the said railroad stock so subscribed for by said city, and by said subscription said city became a legal stockholder in said railroad company to the amount of four hundred thousand dollars, ($400,000.)

Your orators further say that Thomas L. Smith, John S. Davis, Jesse J. Brown, (survivor of James Brooks,) John L. McDonald, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner, Horatio N. Duvol, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Phineas M. Kent, John B. Anderson, Bela C. Kent, and Alexander Kent, John B. Winstandly, personally, and Jesse B. Brown and John B. Winstandly as executors of the estate of John Brown, late of said city of New Albany, deceased, and Augustus Bradley, are each endebted to said railroad company upon subscription to its capital stock at the time of the incorporation of said company in the sum of four thousand and seven hundred dollars, [each,] which several sums of money, together with the interest thereon from the first day of January, 1855, is due and payable from each of them to said railroad company.

Your orators further say that said defendants James Montgomery, Samuel Montgomery, Benjamin F. Scribner, Horatio N. Duval, Thomas Danforth, Franklin Warren, Walter Mann, Asabel Claff, George V. Howk, Ephriam S. Whistle, Bradford E. Scribner, William Lockmiller, James Johnson, John F. Anderson, John Knefley, Michael C. Kerr, Isaac P. Smith, Augustus Bradly, John H. McMahan, and Lawrence Bradly, are each and all of them severally indebted to said railroad company upon subscription to its capital stock in the sum of twenty-two hundred dollars, [each,] with interest from the first day of January,

1855, all which several sums of money are now due and payable to said railroad company.

6 Your orator Heman Ely further says that said C. Arther Ely died on or about the first day of July, A. D. 1869[5], and that he has been duly appointed and qualified as executor of his estate, and that he is still such exec'ta[o]r.

Your orators therefore pray that process may duly issue in this case; that said railroad company, The City of New Albany, Thomas L. Smith, John S. McDonald, Jesse J. Brown, survivor of James Brooks, John S. Davis, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner, H'ratio N. Duval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephriam S. Whistle, William Lockmiller, John Knefley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahan, Laurence Bradley, James Montgomery, Samuel Montgomery, Walter Mann, Asahel Claff, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Windstandly, personall', and Jesse Brown and John B. Winstandly, as executors of John Brown and Augustus Bradly, may be duly notified of the pendancy and prayer of this bill, and required to answer the same; that the balance of said judgment due to your orators, and the interest thereon, may be ascertained, and that the amount due and owing by said city of New Albany and said other debtors of said railroad company may be ascertained, and that enough of said several sums of money so found due to said railroad company may be ordered to be applied upon the indebtedness of said company to your orators above set forth, to satisfy and discharge the same, together with the costs; and that such other and further relief may be granted and decree rendered, as justice and equity require.

JOHN PHELPS PUTNAM.
HEMAN ELY.
HEMAN ELY,
As Executor of C. Arther Ely, Deceased.
STEVENSON BURKE.

PORTER, HARRISON & FISHBACK,
Att'ys for Complainants.

And thereupon there was issued out of said clerk's office a subpœna in chancery in the above-entitled cause, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Indiana:

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded to summon The New Albany and Sandusky City Junction Railroad Company, The City of New Albany, Thomas L. Smith, John S. McDonald, Jesse J. Brown, (survivor of James Brooks,) John H. Davis, Ezekiel R. Day, Silas C. Day, Benjamin F. Scribner, Horatio N. Deval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, William Lockmiller, John Kneffley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahan, Lawrence Bradley, James Montgomery, Samuel Montgomery, Walter Mann, Asahel Claff, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Windstandly, and Jesse Brown and John

7 B. Winstandly, the two latter as executors of John Brown, late of Floyd County, in said district, deceased, and Augustus Bradley, citizens of and residents in the State of Indiana, if they be found in your district, to be and appear in the circuit court of the United States for the district of Indiana aforesaid, at Indianapolis, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in said court against them by Herman Ely, (for himself and as executor of the will of C. Arthur Ely, late resident of the State of Ohio, deceased,) citizen and resident of the State of Ohio; John Phelps Putnam, citizen and resident of the State of Massachusetts; and Stevenson Burke, a citizen of and resident in the State of Ohio. Hereof they are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable S. P. Chase, Chief Justice of the United States, this 29th day of January, A. D. 1868, and in the 92d year of the independence of the United States of America.

Attest:

[SEAL.] JOHN D. HOWLAND, *Clk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of March, 1868; otherwise the said bill may be taken pro confesso.

J. D. HOWLAND, *Clerk.*

And afterwards, to wit, on the 3d day of March, A. D. 1868, the marshal of said district returned in said clerk's office the said subpœna in chancery, with the following return endorsed thereon, to wit:

Feb'y 10th, 1868, I served the within by reading the same to Jesse B. Brown, for himself and as executor of John Brown, Lawrence Bradley, Augustus Bradley, Thomas Danforth, John McMahan. Feb'y 11th, 1868, served by reading to William S. Culbertson, John S. Davis, E. R. Day, H. N. Devol, James Johnson, John Kneffly, John J. McDonald, B. C. Kent, Franklin Warran, Sanderson, mayor of New Albany, and , city clerk of N. Albany; and by reading to, and copy left with, Thomas L. Smith, for himself and as secretary of the N. A. and Sandusky City Junc. R. R. Co., Isaac S. Smith, John F. Anderson, Walter Mann, and E. J. Whistler, and copy left at the residence of S. C. Day, J. B. Crawford, M. C. Kerr, Samuel Montgomery, and James Montgomery, for himself and as president of the N. A. and S. City Junc. R. R. Co., and also Geo. V. Howk, by reading to John B. Winstandly, for himself and as ex. of John Brown, and Benj. F. Scribner, William Lockmiller, J. B. Anderson; Asahel Claff not found in my district; Al'x. Kent and B. R. Scribner not served for want of time.

BENJ. SPOONER, *U. S. Marshal.*
By H. N. BIGELOW, *Dep'ty.*

And afterwards there was issued out of said clerk's office an alias subpœna in chancery in the above-entitled cause for Alexander Kent and E. B. Scribner, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Indiana:

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded to summon Alexander Kent and E.

8 B. Scribner, citizens of and residents of the State of Indiana, if they be found in your district, to be and appear in the circuit court of the United States for the district of Indiana aforesaid, at Indianapolis, on the first Monday in April next, to answer a certain bill in chancery filed and exhibited in said court against them and sundry other defendants by Heman Ely and Stevenson Burke, citizens of the State of Ohio, and John Phelps Putnam, citizen of and resident in the State of Massachusetts. Hereof they are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States, this 7th day of March, A. D. 1868, and in the 92 year of the independence of the United States of America.

Attest:

[SEAL.] J. D. HOWLAND, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of April, 1868; otherwise the said bill may be taken pro confesso.

J. D. HOWLAND, *Clerk.*

And afterwards, to wit, on the 26th day of March, A. D. 1868, the marshal of said district returned into the said clerk's office the said subpœna in chancery, with the following return endorsed thereon, to wit:

March 13th, 1868, I served the within subpœna as commanded by leaving a copy at the last usual place of residence of E. B. Scribner.

BEN. SPOONER, *U. S. Marshal.*
By JOHN C. SPOONER, *Deputy.*

March 20th, 1868, I served the within s'p'a by reading to and copy left with Alexander J. Kent.

BEN. SPOONER, *U. S. Marshal,*
By C. FRANKENBERGER, *Deputy.*

And afterwards, to wit, on the 27th day of February, A. D. 1868, the defendant Ezekiel R. Day, by Collins and Day, his solicitors, filed in the office of the clerk of said court his answer to said bill of complaint in the words and figures following, to wit:

Ezekiel R. Day, for separate answer to said complaint, or to so much thereof as he is advised is material for him to make answer unto, answers and says:

1st. That he admits the organization of said New Albany and Sandusky City Junction Railroad Company, and that he subscribed for five thousand dollars ($5,000) of the stock of said company.

2d. He admits that said city of New Albany, by its corporate authorities, subscribed for four hundred thousand dollars of the stock of said railroad company, of which said city has paid but a very small portion; only some eight thousand dollars or ten thousand dollars, ($8,000 or $10,000.)

3d. He knows nothing, except from hearsay, of said plaintiff's holding bonds, having sued upon them, obtained decree of foreclosure thereon, and having exhausted the property in mortgage for their security; nor does he otherwise know of any balance that may be due or coming from said railroad company to said plaintiffs, respectively.

9 He makes this answer a cross-complaint against his co defendant, and charges—

1st. That said railroad company was organized in good faith, with a view to construct the improvements contemplated; that, after subscribing for the five thousand dollars ($5,000) of stock in said company, he, the said E. R. Day, subscribed for, took, and paid for other stock in said railroad company, six hundred and twenty-two shares, (622,) making thirty-one thousand one hundred dollars, making his entire stock in said railroad company seven hundred and twenty-two shares, amounting to thirty-six thousand and one hundred dollars, of which he has paid up six hundred and fifty-two shares, (652,) or thirty-two thousand six hundred dollars, leaving, of all his subscription to that stock, only three thousand five hundred dollars ($3,500) unpaid.

He charges that the affairs of said company were so managed that many of the stock subscribers were, like himself, required to pay up, and did fully pay up, and that others equally bound did not pay up in full, but paid only a very small portion of what they should have paid; that the said institution was so managed as to expend, for one purpose or another, all the money so paid in, without regard to who paid it; and in this way this defendant, with many others, did pay in a large amount of money more than an equitable proportion of what the company actually expended; that many of the largest subscribers only paid in three hundred dollars ($300) on five thousand dollars, ($5,000,) while this defendant paid in thirty-two thousand six hundred dollars ($32,600) on thirty-six thousand one hundred dollars, ($36,100,) and the codefendant, "The City of New Albany," though a subscriber for four hundred thousand dollars, ($400,000,) only paid in some eight or nine thousand dollars, ($8,000 or $9,000,) thereby making this defendant, and those acting like him, bear a disproportionate share of the burdens of said railroad company.

This defendant is not informed of the actual amount subscribed by his several codefendants, but charges that he is informed and believes that the following other subscriptions were made, and that on no one of them was any payment made to exceed three hundred dollars, ($300,) to wit:

John S. Davis subscribed for 100 shares	$5,000
Thomas L. Smith, sr., 100 shares	$5,000
Brooks and Brown, 100 shares	$5,000
John S. McDonald 100 shares	$5,000
Deval and Fordyce, 100 shares	$5,000
James Montgomery, 50 shares	$2,500
Samuel Montgomery, 50 shares	$2,500
Scribner and Deval, 50 shares	$2,500
Silas C. Day, 40 shares	$2,000
Thomas Danforth, 50 shares	$2,500
Franklin Warren, 40 shares	$2,000
John Bushnell, survivor of Plumer and Bushnell, 100 shares	$5,000
William Culbertson, 50 shares	$2,500
John B. Crawford, 40 shares	$2,000
Walter Mann, 40 shares	$2,000
Phineas M. Kent, 100 shares	$5,000
George V. Howk, 50 shares	$2,500
Ephriam S. Whistler, 20 shares	$1,000
Bradford E. Scribner, 20 shares	$1,000
John Loughmiller, 20 shares	$1,000
James Johnson, 20 shares	$1,000

10	Henry Lake, 20 shares	$1,000
	John F. Anderson, 30 shares	$1,500
	Peleg M. Wilcox, 50 shares	$2,500
	John Kneffley, 40 shares	$2,000
	Horatio N. Duval, 20 shares	$1,000
	Bela C., Horace B., and Alexander J. Kent, as Kent & Bro's, 100 shares	$5,000
	John B. Winstandley, 100 shares	$5,000
	John Brown, 100 shares	$5,000
	Michael C. Kerr, 20 shares	$1,000
	Isaac P. Smith, 25 shares	$1,250
	Augustus Bradley, 20 shares	$1,000
	John McMahan and Laurence Bradley, as McMahan and Bradley, 50 shares	$2,500
	Henry Beharrell, sr., 130 shares	$6,500

besides a number of others, whos' names and the amount of whos' subscription, when ascertained, he prays that they may be made def'ts hereto, and required to answer. But the said city of New Albany, and the subscribers already mentioned, on paying equally with this defendant, would entitle him to be reimbursed a large sum of money. Others may be discovered by a proper officer, to be appointed by this court, to take charge of the books and papers of said railroad company, to proceed to bring it into liquidation, and to adjust the equities of the stockholders, after paying off the just liabilities of said company. He makes Nelson Fordyce, of Putnam County, Phineas M. Kent, of White, and John Loughmiller, Horace Kent, Henry Beherrel, senior, all of Floyd County, defendants hereto, and prays that they may be summoned to answer this and the original complaint, and abide by the action of the court herein. In order whereto will your honor be pleased to appoint a receiver herein, with instruction to take possession of the books, papers, rights, choses in action, and all matters pertaining to it, and to proceed to ascertain the liabilities thereof, and so to adjust the business of said company as to pay off its just liabilities and equalize the burdens and losses thereof according to equity among the stockholders, with other proper relief, etc.

COLLINS AND DAY,
For Def't.

DAY, *E. R.*

And, afterwards, to wit, at the November term of said court, on the 28th day of March, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following proceedings in the above-entitled cause were had, to wit:

Now come the said several defendants to the bill herein, except J. B. Anderson and Asahel Claff, by their solicitors, Thomas L. Smith, esq., George V. Howk, esq., and Mess. Hendrick, Hood and Hendricks, and enter their appearance herein.

And, afterwards, to wit, at the May term of said court, on the 26th day of June, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and the defendants now file their demurrer to said bill, which said demurrer is as follows:

11 The joint and several demurrer of The New Albany and Sandusky City Junction Railroad Company, The City of New Albany, Thomas L. Smith, John S. McDonald, Benjamin F. Scribner, Horatio N. Deval, Thomas Danforth, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, Bela C. Kent, Alexander J. Kent, Michal C. Kerr, Isaac P. Smith, John H. McMahan, Laurence Bradley, James Montgomery, Samuel Montgomery, George V. Howk, Bradford E. Scribner, John F. Anderson, John B. Winstandly, Jesse J. Brown and John B. Winstandley, executors of John Brown, late of New Albany, deceased, and Augustus Bradley, part of the defendants to the bill of complaint of John Phelps Putnam, Heman Ely, for himself and as executor of the estate of C. Arthur Ely, deceased, and Stevenson Burke, complainants.

The said defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the complainants' said bill of complaint to be true in such sort, manner, and form as the same are therein set forth and alleged, for answer to the said complainants' bill of complaint, these defendants, jointly and severally, do demur in law, and for cause of demurrer say:

That it appears by the plaintiffs' own showing in their said bill of complaint that they seek in this honorable court to enforce and collect a certain alleged judgment obtained by them against the said New Albany and Sandusky City Junction Railroad Company, in the Floyd circuit court, of the county of Floyd, and State of Indiana, a court possessed of the proper jurisdiction, and which said court, as it appears on the face of said bill of complaint, had assumed and fully acquired jurisdiction of the subject-matter of this suit long before this suit was commenced, and was and is fully competent, under the laws of the said State of Indiana, to enforce and collect the said alleged judgment in the manner contemplated in said bill of complaint, under and by virtue of the provisions of the 23d article, entitled "Proceedings supplementary to execution," of an act of the general assembly of the State of Indiana, entitled "An act to revise, simplify, and abridge the rules, practice, pleadings, and forms in civil cases in the courts of this State, to abolish distinct forms of action at law, and to provide for the administration of justice in a uniform mode of pleading and practice, without distinction between law and equity," approved June 18, 1852.

Wherefore, and forasmuch as the complainants' said bill of complaint doth not contain, as these defendants are advised, any matter of equity sufficient to establish any right or demand against these defendants, or either of them, nor to draw them, or either of them, in suit into this honorable court, touching the matters complained of in the complainants' said bill of complaint, and also for many other errors and imperfections in the complainants' said bill of complaint contained, these defendants do demur in law thereto, and thereby crave the judgment of this honorable court, whether they ought to make any answer to the said bill of complaint, and these defendants, jointly and severally, pray to be hence dismissed with their costs in this behalf wrongfully sustained.

GEORGE V. HOWK,
THO'S L. SMITH,
HENDRICKS, HORD AND HENDRICKS,
Solicitors for said Defendants.

12 DISTRICT OF INDIANA, *sct:*

I, George V. Howk, of counsel for said defendants, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

GEORGE V. HOWK.

UNITED STATES OF AMERICA,
District of Indiana, County of Floyd, sect:

The said James Montgomery and George V. Howk, for themselves and on behalf of their said codefendants, make oath and say that the foregoing demurrer is not interposed for delay, and further say not.

JAMES MONTGOMERY.
GEORGE V. HOWK.

STATE OF INDIANA, *Floyd County, sct:*

Subscribed and sworn to before me this 16th day of June, 1868.
Witness my hand and the seal of the Floyd circuit court.
[SEAL.] W. W. TULEY, *Clk.*

And said demurrer is now set down for hearing, and, after argument, the court takes the questions presented under advisement.

And afterwards, to wit, at the May term aforesaid of said court, on the 6th day of July, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and the court doth thereupon sustain the demurrer of the defendants above named to the cross-bill of Ezekiel R. Day, and the said cross-bill is now dismissed, and thereupon the demurrer of the defendants to the complainants' bill of complaint is overruled, and the complainants have leave to amend their bill at any time before the first Monday of September next, and the defendants are ruled to answer said bill on that day, and it is ordered that said Day do pay the costs of his said cross-bill.

And afterwards, to wit, in vacation of said court, on the 7th day of September, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had to wit:

Now come The City of New Albany, and The New Albany and Sandusky City Junction Railroad Company, by Mess. T. L. Smith, George V. Howk, and Hendricks, Hord and Hendricks, and file there separate answers herein.

And also come now Thomas L. Smith and twenty-seven others, defendants herein, by the same solicitors, and file their answer herein.

And here follows the answer of The City of New Albany:

The answer of The City of New Albany to the bill of complaint filed against her and others by John Phelps Putman and others in said circuit court of the United States for said district of Indiana.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainants' bill contained to be true in manner and form as the same are therein set forth and alleged, but specifically denying the same, except so far as the same are here-

13 inafter admitted and stated as true, for answer to the matters and things stated in said bill of complaint, or so much thereof as she is advised it is necessary and proper that she should answer unto, she, answering, says:

That it is true that, on or about the 18th day of November, in the year 1853, one Joseph A. Moffitt, then the mayor of said city, assumed for and on behalf of said city, and in her name, to subscribe for eight thousand (8,000) shares of the capital stock of said New Albany and Sandusky City Junction Railroad Company, at the price and amounting to the sum of four hundred thousand dollars.

Said assumed subscription was in writing, and was and is in substance as follows, to wit:

"*Subscription of stock to the New Albany and Sandusky City Railroad Company.*

["Copy.]

"Whereas an ordinance was passed by the mayor and common council of the city of New Albany on the 18th of November, 1853, by the 1st section of which the mayor of said city was authorized to subscribe in the name and on behalf of said city for eight thousand shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company, amounting to four hundred thousand dollars, to be paid for in bonds of said city of not less than one hundred dollars each, upon the call of said company:

"Now, therefore, I, Joseph A. Moffett, mayor of said city, do hereby, by virtue of the authority given me as aforesaid, subscribed for 8,000 shares of the stock of said railroad company in the name and on behalf of said city of New Albany, to be paid for as above provided by said ordinance.

"In testimony whereof I have hereunto subscribed my name as mayor of said city, and caused the seal of said city to be hereto affixed by the clerk this 19th of November, 1853.

"J. A. MOFFETT, *Mayor.*

"Attest: "E. SABIN, *City Clerk.*"

This defendant shows that the only pretended authority for said assumed subscription was a certain ordinance, therein referred to, of the common council of said city, passed on said 18th day of November, 1853; which ordinance was and is in substance, as follows, to wit:

"An ordinance authorizing the subscription of stock and the issue of bonds in and to the New Albany and Sandusky City Junction Railroad Company, passed November 18, 1853.

"Whereas three-fourths of the legal voters of the city of New Albany have petitioned the common council of said city to subscribe for stock, to the amount not exceeding six hundred thousand dollars, in the New Albany and Sandusky City Junction Railroad Company, or in the Fort Wayne and Southern Railroad Company, incorporated to construct a railroad from New Albany to the State line of Ohio, making such subscription to the one or other of said companies, or apportioning it between said companies in such manner or proportions as shall be deemed most for the interest of said city, and to provide for the payment of the debt thus contracted in the manner provided by law: Therefore—

14 "SECTION 1. *It is ordained by the common council of the city of New Albany*, That Joseph A. Moffett, the mayor of said city, be

authorized and directed to subscribe, in the name and behalf of said city, eight thousand (8,000) shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company, amounting to the sum of four hundred thousand dollars, to be paid for in the bonds of said city, of not less than one hundred dollars each, upon the call of said company, said bonds being payable in not less than ten nor more than twenty years after their respective dates, and bearing interest at the rate of six per centum per annum, and both principal and interest payable in the city of New York.

"SEC. 2. The mayor of said city of New Albany shall issue said bonds, with coupons for the interest, payable as aforesaid upon the call of said company, and deliver the same on the reception of the same amount of certificates of stock of said company, as they may from time to time receive the city bonds. And the said mayor is hereby authorized to sign the corporate name of said city to the bonds so issued by him, and attach thereto the seal of said city, which shall be attested by the city clerk, and for the payment of the interest and the final redemption of said bonds the faith of said city is hereby pledged.

"SEC. 3. The common council shall from year to year levy a tax sufficient to pay the annual interest on the debt hereby created, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof.

"SEC. 4. In preparing the tax duplicate of each year the city clerk shall place the taxes levied under the last preceding section in a separate column, to be styled 'tax for railroad purposes,' and for all payments of such taxes the city treasurer shall issue to the person payin' the same a certificate showing the amount of tax thus paid by such person, which certificate shall be assignable by endorsement.

"SEC. 5. Whenever an amount of such certificates equal to one share of the capital stock of said company, or more, at its par value, shall be presented to the mayor of said city, he shall transfer to the holder of such certificates such number of shares of such stock owned by said city as said certificates may amount to, and, if there should be a fraction over the proper amount, the said mayor shall i sue to the holder a certificate for such fraction, which certificate shall be assignable in the same manner, and entitle the holder to the same rights as the certificates issued by the city treasurer.

"SEC. 6. Before the subscription of said stock and the delivery of said bonds, the following agreement, irrevocable, except by consent of both parties thereto, shall be entered into by the city of New Albany and the New Albany and Sandusky City Junction Railroad Company:

"1. That all shares of stock transferred by said city in accordance with the provisions of the fourth and fifth sections of this ordinance shall be held and recognized by said railroad company as good and valid stock fully paid for."

"2. The New Albany and Sandusky City Junction Railroad Company shall pay to the city of New Albany, in stock of said company, an amount thereof equal at its par value to the amount of interest on the bonds of said city issued under the provisions of this ordinance, for the first three years after the date thereof, deducting therefrom any dividends that may be paid by the said railroad company to said city; the stock thus paid by said railroad company to be issued at such times as the said interest may become due.

15 "3. So soon as the board of directors of said New Albany and Sandusky City Junction Railroad Company shall accept of the foregoing agreement, and pass a by-law, irrevocable, to sustain the same,

it shall be a contract to all intents and purposes, to be rescinded only, in whole or in part, by the consent of the contracting parties.

"SEC. 7. This ordinance is to be in force from and after its passage."

This defendant shows that said common council assumed the power to pass said ordinance by virtue of the provisions of the 56th section of an act of the general assembly of the State of Indiana, entitled "An act for the incorporation of cities," approved June 18th, 1852, which act, including said section, was then in force, and the same constituted and was the only pretended authority for the passing of said ordinance, or the making of said subscription. But defendant says that neither said 56th section of said act, as the same has been construed by the final judgment of the supreme court of the said State of Indiana, nor any other law of said State, conferred any power upon said city or her common council or mayor to pass said ordinance or make said subscription, and that the same were and are utterly void; and respondent says that the recital in said ordinance, to the effect that three-fourths of the legal voters of said city had petitioned as therein stated, was and is untrue, and that no petition by the legal voters of said city, or any of them, to said common council to contract said debt as contemplated by said 56th section of said act was ever at any time made.

This respondent says she is advised that it is pretended and claimed by said complainants and others that said unauthorized and void subscription of stock to said railroad company was, after said pretended making thereof, ratified by said common council, pursuant to power conferred by a subsequent act of the general assembly of said State, entitled "An act to enable cities which have subscribed for stocks in companies incorporated to construct works of public utility, under the 56th section of the general act for the incorporation of cities, and to ratify the same," approved February 21, 1855.

But respondent says that said unauthorized contract and subscription of stock has never been ratified by said common council, or by said city, pursuant to the authority conferred by said last-named act or otherwise, and that the same remains and is void.

Respondent says she is advised and believes that, as against said complainants, she is justly and equitably entitled to aver and show that said supposed subscription was and is void, and not her act, nor binding upon her, because she says that said complainants are not the holders of her negotiable paper, and that they never gave credit to said railroad company upon faith of her said pretended subscription to the stock of said company, and because they, at all times, well knew that said pretended subscription was unauthorized and void.

This respondent, further answering, says that, pursuant to the terms of said unauthorized ordinance and subscription, the proper officers and agents of said city did issue and deliver to said railroad company a large number of bonds purporting to be the corporate bonds of said city, to wit, two hundred bonds of one thousand dollars each, in payment of the calls upon said subscription. At the time said bonds were so issued and delivered said railroad company was actively engaged in the construction of its proposed railroad, and represented to the officers and authorities of said city that it was necessary to procure means by the sale of said bonds to prosecute said road to completion; but
16 shortly after said bonds were so issued and delivered, and before any of them had been sold or disposed of by said company, except seven of them for $1,000 each, suits were instituted in the Floyd

circuit court of said State of Indiana, by divers citizens of the city of New Albany to resist the payment of the tax levied by said common council for the payment of the interest thereon, pursuant to the ordinance aforesaid, and praying for injunction to prevent the collection of said tax on the ground that said subscription had not been duly authorized by the petition of three-fourths of the legal voters of said city. These suits led to a very protracted litigation, and in the mean time the doubt thus cast upon the validity of the said bonds rendered it impossible for said railroad company to negotiate or sell them, except at a ruinous sacrifice. On the 17th of August, 1857, said railroad company represented to this respondent that, in consequence of her inability to sell or negotiate said bonds for the reason aforesaid, she was unable to procure means to prosecute her work, and had suspended and wholly abandoned all operations upon the work of said railroad; that she had expended all the cash and real estate received in payment of stock, and had pledged the bonds so issued to her by this respondant to sundry persons for sundry amounts borrowed by her from time to time to procure means to prosecute said work; that said railroad company had no means whatever for the payment of said amounts so borrowed, and unless this respondant would provide means for the payment of said amounts, the whole amount of the bonds so issued by this respondant would be sold for the payment thereof, and, owing to the doubt thus cast upon their validity, would not sell for more than would be sufficient to pay the sums so borrowed. Said railroad company therefor' proposed to this respondant that if the latter would provide means to pay said amount so borrowed, and redeem said bonds from the persons with whom they were pledged, said bonds should be returned to this respondant to be cancelled.

This respondant believing said representation to be true, and that there was no probability that said railroad company would ever be able to resume operations upon its said railroad, or even complete any portion of the same, did, by its ordinance of her common council, passed on the day last aforesaid, and duly published immediately thereafter, accept said proposition of said railroad company, upon the condition that the latter would cancel the said subscription of stock made by this respondant, and consent to the repeal of all ordinances and amendments thereto in relation to said subscription. This condition was duly accepted by said railroad company, and said agreement was thereupon carried into effect on the day and date aforesaid. This respondant paid said sums so borrowed by said railroad company, and for which said bonds were pledged, amounting to more than thirty-six thousand dollars,($36,000.) Said bonds so issued by this respondant, except seven, which had been sold, were returned to this respondant and cancelled, and said subscription of stock made by this respondant was cancelled, and since that date this respondant has not held or owned any stock whatever of said railroad company, nor has she owed, nor does she now owe, any sum whatever to said railroad company. At the time said agreement last mentioned was made, and said subscription of stock cancelled, said railroad company represented to this respondent that, by the payment of said sums necessary to redeem said bonds, all the debts and liabilities of said railroad company would be extinguished. This respondant believed said representation to be true, and the respond-
17 ant now avers they were true, and that said railroad company had no other liabilities, and owed no other debts whatever, unless said railroad company shall still remain liable for same amounts upon the real-estate bonds hereafter mentioned. Said agreement was

made by this respondant in the utmost good faith, without any interest to hinder or defraud the creditors of said railroad company in the collection of their debts, and for the sole purpose of preventing the large amount of her corporate bonds so issued *so issued* to said railroad company from being sold for the payment of the debts for which they were pledged as aforesaid. Said suits contesting the validity of said bonds were then still pending in said Floyd circuit court, and there was no possibility of having a determination thereof before said debts for which they were pledged were required to be paid. And this respondant believes and avers that, but for said agreement and the payment of said debts by her, said bonds would have been sold, and that, under the doubt thus cast upon their validity, said railroad company could not have realized from such sale enough or more than enough money to pay the debts for which they were pledged.

And this respondant further avers that the complainants, in their bill of complaint in this suit mentioned, did not, nor did either of them, nor did any person or persons, do any act or thing to contest the validity of said agreement so made with said railroad company and the cancellation of said subscription of stock, or institute any suit or proceedings to have the same set aside as fraudulent and void as against these or any other creditors of said railroad company until more than ten years after said agreement was made and carried into effect; nor was any such suit or proceedings ever instituted, or the validity of said agreement called in question until the bill of complaint was filed in this suit, more than ten years after said agreement was consummated, although they well knew of said agreement and cancellation at the time thereof.

And this respondant, further answering, says that, on the 20th of September, 1854, said railroad company, being the owners of a large quantity of real estate received in payment of stocks subscribed, conveyed a portion of the same by a deed of that date to the said William S. Pierson, jun., and Harvey Seymour for the uses and upon the trusts therein specified. Said deed recites that said railroad company, being the owner in fee-simple of said real estate, had resolved to raise a sum of money not exceeding one hundred and ten thousand dollars in amount, upon a mortgage of said property to the said Pearson and Seymour, to aid in the construction of its railroad, and for that purpose to execute one hundred and ten bonds for one thousand dollars each, to be negotiable in the city of New York, and made payable on the 1st day of January, 1865, bearing an interest payable semi annually in the city of New York, without relief from valuation or appraisement laws, and containing a clause permitting the holder thereof to exchange the same at par for shares of stock in said railroad company at any time within five years from the date thereof; and that, therefore, to secure the payment of said bonds and interest, the said railroad company conveyed to the said Pearson and Seymour, and their successors in the trust thereby created, all of said property therein specified, approved by Victor A. Pepin, Samuel H. Owen, and Augustus Bradley to be of the value of one hundred and fifty-four thousand eight hundred and fifty-five dollars, ($154,855,) and more particularly specified and enumerated and described in a schedule of the same, certified by said appraisers to be of the value aforesaid, thereto annexed and made a part of said deed. By the terms of said deed said Pearson and Seymour were to have and hold said property upon the trusts that if said railroad company
18 should fail to pay the principal or any part of it, or any part of the interests upon the same, when the same should become due,

when demanded, then, after sixty days from such default, upon request of the holder of such bond, said trustees should enter and take possession of all or any part of said property, and apply the rents and profits thereof to the payment of the principal and interest of all such bonds remaining unpaid, or *upon* said trustees might, at their discretion, and upon the written request of the holders of at least one-half of said bonds should, cause said property to be sold at public auction in the manner therein specified, and apply the proceeds of such sale to the payment of said bonds and interest, and the necessary expenses. By a supplemental agreement, made a part of said deed, it was provided that if said railroad company should at any time be in default in the payment of the interest due on any of said bonds, then the principal of all of said bonds should become due and payable from the time of such default, and any suit or action at law or equity might be commenced against said railroad company to recover said principal and interest, and after sixty days from such default said Pearson and Seymour, as such trustees, should take possession of all said property, and at their discretion use or sell the same for the payment of any part of said bonds and the interest thereon.

This respondant is informed and believes it to be true that said Pearson and Seymour accepted the trust specified in said deed, and that said railroad company made and issued one hundred and ten bonds for one thousand dollars ($1,000) each, of the character and description therein mentioned.

This respondant is also informed, and believes it to be true, that one Victor A. Pepin did bring a suit upon certain of said bonds described in said deed against said railroad company and others, in the Floyd circuit court, at its October term, 1857, as charged in said bill of complaint; said Pearson and Seymour, as such trustees, were made parties to said suit, and, having been informed that fifty-three of the bonds specified in said deed of trust were outstanding in the hands of the said John Phelps Putnam, Sarah Coit Day, Samuel J. Andrews, Catherin' D. Andrews, Rollin C. Dewitt, Elijah Dewitt, George R. Starr, Horace C. Starr, Heman Ely, C. Arther Ely, and Augustus H. Moss, none of whom were parties to said suit, in discharge of their duty as such trustees, and to secure to said persons their equitable rights to the property specified in said deed of trust, filed an answer in said suit, aver'ing that said fifty-three bonds were outstanding in the hands of said persons and praying that said mortgaged property should be sold for the payment of the same.

This respondant also admits it to be true that, on the 14th of November, 1857, a judgment was rendered by said court for the foreclosure and sale of said mortgaged property for the payment of the bonds claimed by the plaintiff and cross-complainants in said suit, and in favor of the said Pearson and Seymour, in trust for the payment of those alleged by them to be outstanding in the hands of the persons aforesaid; but this respondant denies that, in the order made by said court for the sale of said mortgaged premises, there were any directions that the ballance due on the mortgage debt and costs of suit which might remain unsatisfied after the sale of the mortgaged premises should be levied of any other property of said railroad company. No such direction was requested of said court by said Pearson and Seymour as such trustees, nor were they, nor have they ever been, trustees for the persons aforesaid for any other trust or purpose but to hold the
19 mortgaged premises aforesaid for the purposes specified in said deed of trust hereinbefore mentioned. They had no authority to

sue for the persons named in the answer filed by them in said suit, and said answer was filed for the sole purpose of securing to them their due proportion of the proceeds of said mortgaged property when the same should be sold for the payment of the lands thereby secured.

Respondant says that the said supposed award of execution in favor of said complainants for the said supposed amount remaining unsatisfied after the sale of the mortgaged premises was made at a term of said Floyd circuit court subsequent to the term at which final judgment in said cause was rendered; that said railroad company was not then present in court, nor had been summoned or notified to appear, and was not subject to the jurisdiction of the court in that behalf; wherefore respondant says there is no record of the said supposed award of execution in the complaint mentioned.

This respondant further says that, after said judgment was rendered, said persons named in said answer of said trustees assumed the direction and control of the judgment so rendered in trust for their use and pursuant to an agreement made by them and the other parties to said suit, in whos' favor judgment was rendered on bonds of the same description held by them. Nearly all of the property described in said mortgage or deed of trust was bid off by Victor A. Pepin and Michael C. Kerr at the sale of the same, made pursuant to said judgment; and said property was conveyed to said Pepin and Kerr to be held by them in trust for the use of said several parties in whos' favor said judgment was rendered. Said railroad was also the owner of a large quantity of other real estate not included in said mortgage or deed of trust which had been mortgaged to certain other of the parties in whose favor said judgment was rendered as additional security for the bonds held by them. At a subsequenty sale of the property included in said last-mentioned mortgage, by the agreement of parties in whos' favor the same had been made, and the consent of said railroad company, the same was bid off at a nominal price by said Heman Ely, in order that all the property included in both mortgages should be thrown into a general fund for the payment of all the bonds secured by said mortgage first mentioned. Said Ely bid off said last-mentioned property for the benefit of all said several parties holding said bonds, and paid nothing therefor.

All of said property, as well that included in said deed of trust to said Pearson and Seymour as that included in said second mortgage, being thus vested in the parties originally holding the bonds so secured by said deed of trust, afterwards a voluntary agreement for a partition was made by said several parties, each agreeing to receive the portion or share allotted to him at a stipulated price or value. In said partition said persons for whom said judgment was rendered in favor of said Pearson and Seymour in trust as aforesaid, and who are now represented by the complainants in this suit, recovered a larger portion of said property, taking the same for the aggregate sum of twenty-five thousand six hundred and ninety-eight dollars,($25,698,) a large portion of which was property not covered by the deed of trust to said Pearson and Seymour, but being other properties of said railroad company bought as aforesaid, to be thrown into the general fund, which last-mentioned property was taken by them at the price of ten thousand dollars, ($10,000.) And afterwards, at the November term of the Floyd circuit court, in 1858, on the petition of said parties, a decree was rendered by said court partitioning all of said property to said several parties according to the terms of said voluntary agreement for a partition, since which time the complainants in the bill of

complaint in this suit mentioned, or those they represent, have been in possession of all said property so partitioned to them, and still hold and possess the same under the title thus required.

And this respondant further shows that, afterwards, to wit, on the 19th day of February, in the year 1863, one William Lindly filed in said Floyd circuit court of the State of Indiana his complaint against said John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah Dewitt, Rollin C. Dewitt, George R. Starr, Horace C. Starr, Heman Ely, Charles Arthur Ely, and Augustus H. Moss, (being the same persons respectively who are the complainants in this suit, and the assignors of said Stephenson Burke and Heman Ely,) and said New Albany and Sandusky City Junction Railroad Company and others; said complaint was filed by said plaintiff "for himself and for all others holding bonds similar in character to the three held by him of the 110 hereinafter named."

Said William Lindley, in his said complaint, averred, among other things, that he was the owner of three of said real estate bonds secured by said mortgage or deed of trust to said Pearson and Seymour in the bill of complaint herein mentioned, and duly filed with his said complaint copies of said bonds and of said mortgage or deed of trust, and prayed for judgment upon said bonds, and foreclosure and sale of said mortgage premises to satisfy the same; and in his said complaint said Lindley further averred generally that all the defendants therein named, other than said railroad company and said Pearson and Seymour, trustees, (who were also made defendants,) claimed some interest in the subject of said action; wherefore they were made parties, and required to answer thereto.

Respondant says that said Floyd circuit court then *then* had full and complete jurisdiction of the subject-matter of said suit; and that subsequently, and before trial or final judgment in said cause, said court obtained and had full jurisdiction of the persons defendants therein, in respect of said cause, by its process duly issued and served, and by the personal appearance of all said defendants to said action.

And afterwards, to wit, at the May term, 1864, of said Floyd circuit court, said John T. Putnam, Samuel T. Anderson, Sarah C. Day, Elijah Dewitt, Rollin C. Dewitt, George R. Starr, Horace C. Starr, Heman Ely, Charles Arthur Ely, and Augustus H. Mass, (together with another defendant,) appeared and filed their just answer and cross-complaint in said cause against said plaintiff Lindley and their codefendants, including said railroad company, in which answer and cross-complaint, among other things, they averred and set up said former judgment of foreclosure of said mortgage and sale of said mortgage premises, being the same mentioned in the bill of complaint herein, and averred that the proceeds of said sale of the mortgage premises were wholly insufficient to pay their said claims and demands, (being the identical claims and demands in the bill of complaint herein mentioned,) and that they have never received from said railroad company in payment, on account of said former judgment of foreclosure, (being the same mentioned in the bill of complaint herein,) anything except certain lands therein mentioned set off to them as their proportion of the lands purchased at said sale under said former judgment of foreclosure, and that the balance of said former judgment in their favor respectively, as shown by the report of the commis-
21 sioner appointed by the court in and by said former judgment of foreclosure to make sale of said mortgage premises, remained wholly unpaid.

And upon said answer and cross-complaint, and each allegation

thereof, afterwards, in said Floyd circuit court, issue was taken and joined by said plaintiff William Lindley, and by said New Albany and Sandusky City Junction Railroad Company.

And afterwards, at a special term of said Floyd circuit court, to wit, on the 18th day of February, 1868, each of the complainants herein appeared in said cause, in said Floyd circuit court, and filed his further answer therein, the said Heman Ely, in his individual character as mortgage creditor and assignee of the interest of said George R. Starr and Horace C. Starr, as in the complaint mentioned, and also in his representative capacity as executor of said C. Arther Ely, then deceased; and the said Stevenson Burke appearing and answering as assignee of said several interests of said Sarah C. Day, Samuel J. Andrews, and Catharine D. Andrews, his wife, Elijah Dewitt, Rollin C. Dewitt, and Augustus H. Mass, as in the complain*ed* claimed; by which said last-mentioned answers said complainants herein respectively averred that they were the owners of certain of said real-estate bonds, being the identical bonds that had theretofore belonged to them and to those under whom they respectively claimed as aforesaid, and being the identical bonds upon which said former judgment of foreclosure had been rendered in their favor, or in favo*u*r of those under whom they respectively claim as aforesaid, and being the identical bonds upon which alone the said supposed judgment and indebtedness in favo*u*r of complainants respectively, as in said bill of complaint mentioned, is founded; and in and by their said answers in said cause these complainants, John Phelps Putnam, Heman Ely, and Stevenson Burke, (said Heman Ely also answering as executor as aforesaid,) respectively joined in the said complaint of said plaintiff William Lindley, and prayed the same relief asked for by him in said cause.

Respondent shows that said cause in said Floyd circuit court was still pending for trial and judgment at the time of the filing of the bill of complaint herein, and at the time when this suit was commenced by said complainants.

And respond*a*nt says that, afterwards, at said last-named term of said Floyd circuit court, to wit, on the 19th day of February, in the year 1868, the issues in said cause in said Floyd circuit court being duly made and joined by the parties thereto, and the question as to the payment and satisfaction of the bal*l*ance due on said judgment and said bonds being at issue, and being tried, said cause was submitted to the court for trial and judgment. And upon said trial, after hearing the evidence adduced, said court, among other things, found that, by the agreement of the parties, the said former judgment of foreclosure, (comprising, among others, the complainants, and those whom they represent as aforesaid,) who were then the holders of said bonds, and the said railroad company, the said mortgage premises were received by them in full payment, satisfaction, and extinguishment of all claims and demands against said railroad company, or any other person, upon said bonds and mortgage, and in full payment, satisfaction, and extinguishment of the said judgment of foreclosure so rendered thereon as aforesaid; and as to said complainants in this suit, and as to all the other parties to said suit in said Floyd circuit court, except said plaintiff therein, William Lindley, claiming to be the holders and owners of any of the bonds described in said mortgage, and seeking judgment thereon, said court found in favor of the defendants to their
22 respective claims or complaints therein, and that said claimants, and each of them, had no equities whatever in their said claims, and were not entitled to any relief in said action. And thereupon it

was, by said Floyd circuit court, finally ordered, adjudged, and decreed in said cause, among other things, that the said John P. Putnam, Heman Ely, Stevenson Burke, Heman Ely, exec*ture* of the last will of C. Arthur Ely, deceased, as well as other defendants in said judgment and decree mentioned, who had also claimed to be the holders of certain of said bonds, and had in like manner prayed relief in said cause, should take nothing by their suits therein; and that, as to each of their claims or complaints therein, the defendants thereto should go hence thereof without day.

And this respond*ant* avers that said final judgment of said Floyd circuit court remains unreversed and in full force. And this defendant says that no material matter in said bill of complaint contained, not herein sufficiently answered, confessed, traversed, and avoided, is true, to the knowledge and belief of this defendant.

All which matters and things in this answer contained this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct.

And said defendant humbly prays to be hence dismissed, with her reasonable costs and charges in this behalf wrongfully sustained.

THOMAS L. SMITH,
GEORGE V. HOWK, and
HENDRICKS, HORD AND HENDRICKS,
Sol's for Defendant.

And here follows the answer of the New Albany and Sandusky City Junction Railroad Company:

The answer of the New Albany and Sandusky City Junction Railroad Company to the bill of complaint filed against her and others by John Phelps Putnam and others in said circuit court of the United States.

This defendant, by protestation, nor confessing all or any of the matters and things in said complainants' bill of complaint contained to be true, in manner and form as the same are therein set forth and alleged, but specifically denying the same, except so far as the same are hereinafter admitted and stated to be true, for answer to the matters and things stated in said bill of complaint, or so much thereof as she is advised it is necessary and proper she should answer unto, she, answering, says:

This respond*ant* admits it to be true that, at the October term of the Floyd circuit court in 1857, a suit was instituted in said court by Victor A. Pepin against this respond*ant* and others, to recover the amount due upon certain bonds issued by this respond*ant*, known as real-estate bonds, and that a judgment was rendered in said suit for the foreclosure and sale of certain real estate mortgaged by this respond*ant* by a deed of trust to William S. Pearson and Harvey Seymour to secure the payment of said bonds; but this respond*ant* denies that, in judgment aforesaid, as in the order made by said court for the sale of said mortgaged premises, there was any order or direction that the balance due on the mortgaged debt and costs of suit which might remain unsatisfied, after the sale of the mortgaged premises, should be levied of any other property of this respond*ant*'s; and she denies that any valid execution ever issued on said judgment after the sale of said mortgaged premises, made pursuant to said judgment.

23 And this respond*ant* further says that, at the sale of said mort-

gaged premises, nearly all of the same was, pursuant to an understanding of the parties, bid off for the benefit of the several parties who had obtained said judgment for the foreclosure of said mortgage.

And this respondant admits that at said sale said mortgaged property, at the price it was struck off, did not sell for a sufficient amount to pay the amount adjudged to be due the several holders of said bonds who had obtained said judgment thereon. But this respondant was also the owner of a large quantity of other real estate not included in said mortgage or deed of trust, which had been mortgaged to certain other parties, in whos' favor said judgment was rendered as an additional security for the lands held by them, but upon which the complainants in the bill of complaint in this suit mentioned, or those they represent, had no interest or claim whatever. At a subsequent sale of the property mentioned in said last-mentioned mortgage, pursuant to an agreement of all the parties that all of said property so included in both mortgages should be appropriated to the benefit of all the holders of said 110 bonds, and that they should receive and hold the same as full payment of said bonds and of their said judgment thereon, said property was permitted to be bid off for the benefit of all the holders of said bonds for a nominal sum, and without the payment of any money, which was done; by which means the holders of said bonds acquired title to all the property included in both mortgages, and afterwards had the same partitioned among themselves; the complainants in the bill of complaint mentioned thus receiving a large quantity of valuable real estate of the value of at least ten thousand dollars, ($10,000,) to which they would otherwise have had no claim whatever.

And this respondant further says that, afterwards, in the year 1863, one William Lindley commenced another suit in the Floyd circuit court upon some of the said bonds secured by said deed of trust to said Pearson and Seymour, on behalf of himself and the other holders of said bonds against this respondant and others, in which suit the complainants in the bill of complaint in this suit mentioned were made parties, and, joining with the plaintiff, they demanded judgment on the same identical bonds upon which said judgment had been rendered in said former suit in favor of said Pearson and Seymour in trust for their benefit, and alleged to have been owned by them in their bill of complaint filed in this suit. Issues were joined in said suit commenced by said Lindley upon the complaint filed by him and the complainants in this suit, and the answers of this respondant and others, and said suit was still pending for trial at the time when the bill of complaint was filed, and when this suit was commenced by the complainants, and involved the question of their right of a further satisfaction of said bonds or of the judgment rendered thereon in 1857 as aforesaid. And afterwards, to wit, on the 19th day of February, 1868, said suit commenced by said Lindley being then still pending, a finding and judgment was therein found and rendered by said circuit court. As the result of said trial in said circuit court, said court found that the complainants in the bill of complaint in this suit mentioned, as well as all the other parties originally holding said bonds, had received said property of said railroad company hereinbefore mentioned in full satisfaction and payment of all their claims and demands against this respondant arising out of or upon said bonds in any way whatever; and, therefore, said court rendered judgment in favor of this respondant, and ordered all
24 of said bonds to be filed in said court, and cancelled as fully paid and discharged; which was done. And this respondant avers that said judgment still remains in full force.

And this respondant, further answering, says that, in reference to the judgment of foreclosure in the Floyd circuit court rendered in 1857, in the plaintiff's bill of complaint mentioned, and in reference to the subscription of stock by said city of New Albany, the issuing of bonds by said city in payment therefor, and the return thereof, and the cancellation of said subscription, pursuant to a compromise made by this respondant with said city for the purpose of procuring payment of the debts contracted by this respondant, and for which said bonds had been pledged, and all subsequent proceedings relating thereto, and in reference to the execution and delivery of said deed of trust to said Pearson and Seymour, and of the trust therein conferred, and their proceedings under said trust, this respondant adopts the answer of their codefendant, The City of New Albany, and avers that each and all the matters and things therein stated are true, as fully and effectually as if the same were herein again stated and set forth.

And this respondant further avers that the complainants in the bill of complaint in this suit mentioned did not, nor did either of them, nor did any person under whom they claim, or any other person, do any act or thing to contest the validity of said agreement so made by this respondant with the codefendant, the said City of New Albany, for the cancellation of her subscription for stock, or such cancellation, or institute any proceedings to have the same set aside as fraudulent and void as against them or any other creditors of this respondant, until more than ten years after said agreement was made or carried into effect; nor was any such suit or proceeding instituted, or the validity of said agreement or cancellation called in question, until the bill of complaint was filed in this suit, more than ten years after said agreement was consum'ated.

All of which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf wrongfully sustained.

THOMAS L. SMITH,
GEORGE V. HOWK, AND
HENDRICKS, HORD AND HENDRICKS,
Solicitors for Def't.

And here follows the answer of Thomas L. Smith and twenty-seven others, defendants in said cause:

The answer of Thomas L. Smith, Michael C. Kerr, John S. McDonald, John S. Davis, Horatio N. Duval, Thomas Danforth, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, William Lockmiller, Bela C. Kent, Alexander Kent, John A. McMahan, Laurence Bradly, James Montgomery, Samuel Montgomery, Walter Mann, George V. Howk, Bradford E. Scribner, John B. Winstandly, Jesse Brown and John B. Winstandly, executors of John Brown, deceased, Augustus Bradley, Jesse J. Brown, Benjamin F. Scribner, Isaac P. Smith, and John F. Anderson, to the bill of complaint filed against them and others by John Phelps Putnam and others in said circuit court of the United States for the district of Indiana.

These defendants, by protestation, not confessing all or any of the matters and things in the said complainants' bill of complaint contained to be true in manner and form as the same are therein set forth and alleged, but specifically denying the same, except so far as the

25 same are hereinafter stated to be true, for answer to the matters and things stated in said bill of complaint, or so much thereof as they are advised it is necessary and proper they should answer unto, they, answering, say:

That these defendants did, each of them, with other persons who have not been made parties to this suit, whos' names will be hereafter mentioned, on the 22d of August, 1853, subscribed for stock in the New Albany and Sandusky City Junction Railroad Company in various amounts, each subscription, however, being for more than three hundred dollars of said stock, which subscriptions were made at the time of the organization of said railroad company, but before it became incorporated under the general laws of the State of Indiana as to the incorporation of railroad companies, but with a view to become so incorporated under said general laws, by subscriptions for such stock to articles of association for the purpose of forming such a corporation.

Said articles of association were to the effect that the subscribers thereto agreed to form a railroad company under the laws of the State of Indiana provides for the incorporation of railroad companies, to construct a railroad running between certain places therein named, and for that purpose to subscribe and pay for the amount of stock set opposite their respective names. It was provided, however, in said articles of association so subscribed by these defendants, that if the city of New Albany, in its corporate capacity, should thereafter take stock in said corporation to the amount of fifty thousand dollars or upwards, inasmuch as the defendants and present subscribers thereto were residents of, and owning property in, said city, and would then be under the necessity of contributing still further to the objects of the corporation by way of taxation, unless a portion of their present subscription should be taken off their hands, the said city should accept, in part of the amount to be subscribed in its corporate capacity at its par value, a transfer of any amount of the stock subscribed to said articles of association by these respondants and the other subscribers thereto over and above the amount of six shares or three hundred dollars, which each such individual subscriber should desire or request should be so transferred. A copy of said articles of association and subscriptions thereto is filed herewith, marked Exhibit "A." And these respondants and that city of New Albany did, afterwards, on the 18th of November, 1853, in its corporate capacity, subscribe for 8,000 shares, amounting to four hundred thousand dollars of the capital stock of said railroad company, which had then become a corporation duly organized under the laws of said State of Indiana; and that afterwards, on 31st of December, 1853, an order was duly made by the board of directors of said railroad company to the effect that the original subscribers to the articles of association of said company be permitted, in accordance with the stipulations therein contained, to transfer any amount of the stock so originally subscribed by them, over and above the amount of six shares or three hundred dollars to the said city of New Albany, said city having made a subscription to the stock of said company to the amount of fifty thousand dollars and upwards, and that the stock thus transferred should be merged in the subscription so made by said city, so that the stock of said city under her then subscription with the stock so transferred should not exceed four hundred thousand dollars so subscribed by her. A copy of the said order as the same remains of record among the records of said company is herewith filed, marked Exhibit "B."

And these defendants further say they did, immediately after the

And this respondant, further answering, says that, in reference to the judgment of foreclosure in the Floyd circuit court rendered in 1857, in the plaintiff's bill of complaint mentioned, and in reference to the subscription of stock by said city of New Albany, the issuing of bonds by said city in payment therefor, and the return thereof, and the cancellation of said subscription, pursuant to a compromise made by this respondant with said city for the purpose of procuring payment of the debts contracted by this respondant, and for which said bonds had been pledged, and all subsequent proceedings relating thereto, and in reference to the execution and delivery of said deed of trust to said Pearson and Seymour, and of the trust therein conferred, and their proceedings under said trust, this respondant adopts the answer of their codefendant, The City of New Albany, and avers that each and all the matters and things therein stated are true, as fully and effectually as if the same were herein again stated and set forth.

And this respondant further avers that the complainants in the bill of complaint in this suit mentioned did not, nor did either of them, nor did any person under whom they claim, or any other person, do any act or thing to contest the validity of said agreement so made by this respondant with the codefendant, the said City of New Albany, for the cancellation of her subscription for stock, or such cancellation, or institute any proceedings to have the same set aside as fraudulent and void as against them or any other creditors of this respondant, until more than ten years after said agreement was made or carried into effect; nor was any such suit or proceeding instituted, or the validity of said agreement or cancellation called in question, until the bill of complaint was filed in this suit, more than ten years after said agreement was consum'ated.

All of which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf wrongfully sustained.

THOMAS L. SMITH,
GEORGE V. HOWK, AND
HENDRICKS, HORD AND HENDRICKS,
Solicitors for Def't.

And here follows the answer of Thomas L. Smith and twenty-seven others, defendants in said cause:

The answer of Thomas L. Smith, Michael C. Kerr, John S. McDonald, John S. Davis, Horatio N. Duval, Thomas Danforth, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, William Lockmiller, Bela C. Kent, Alexander Kent, John A. McMahan, Laurence Bradly, James Montgomery, Samuel Montgomery, Walter Mann, George V. Howk, Bradford E. Scribner, John B. Winstandly, Jesse Brown and John B. Winstandly, executors of John Brown, deceased, Augustus Bradley, Jesse J. Brown, Benjamin F. Scribner, Isaac P. Smith, and John F. Anderson, to the bill of complaint filed against them and others by John Phelps Putnam and others in said circuit court of the United States for the district of Indiana.

These defendants, by protestation, not confessing all or any of the matters and things in the said complainants' bill of complaint contained to be true in manner and form as the same are therein set forth and alleged, but specifically denying the same, except so far as the

25 same are hereinafter stated to be true, for answer to the matters and things stated in said bill of complaint, or so much thereof as they are advised it is necessary and proper they should answer unto, they, answering, say:

That these defendants did, each of them, with other persons who have not been made parties to this suit, whos' names will be hereafter mentioned, on the 22d of August, 1853, subscribed for stock in the New Albany and Sandusky City Junction Railroad Company in various amounts, each subscription, however, being for more than three hundred dollars of said stock, which subscriptions were made at the time of the organization of said railroad company, but before it became incorporated under the general laws of the State of Indiana as to the incorporation of railroad companies, but with a view to become so incorporated under said general laws, by subscriptions for such stock to articles of association for the purpose of forming such a corporation.

Said articles of association were to the effect that the subscribers thereto agreed to form a railroad company under the laws of the State of Indiana provides for the incorporation of railroad companies, to construct a railroad running between certain places therein named, and for that purpose to subscribe and pay for the amount of stock set opposite their respective names. It was provided, however, in said articles of association so subscribed by these defendants, that if the city of New Albany, in its corporate capacity, should thereafter take stock in said corporation to the amount of fifty thousand dollars or upwards, inasmuch as the defendants and present subscribers thereto were residents of, and owning property in, said city, and would then be under the necessity of contributing still further to the objects of the corporation by way of taxation, unless a portion of their present subscription should be taken off their hands, the said city should accept, in part of the amount to be subscribed in its corporate capacity at its par value, a transfer of any amount of the stock subscribed to said articles of association by these respondants and the other subscribers thereto over and above the amount of six shares or three hundred dollars, which each such individual subscriber should desire or request should be so transferred. A copy of said articles of association and subscriptions thereto is filed herewith, marked Exhibit "A." And these respondants and that city of New Albany did, afterwards, on the 18th of November, 1853, in its corporate capacity, subscribe for 8,000 shares, amounting to four hundred thousand dollars of the capital stock of said railroad company, which had then become a corporation duly organized under the laws of said State of Indiana; and that afterwards, on 31st of December, 1853, an order was duly made by the board of directors of said railroad company to the effect that the original subscribers to the articles of association of said company be permitted, in accordance with the stipulations therein contained, to transfer any amount of the stock so originally subscribed by them, over and above the amount of six shares or three hundred dollars to the said city of New Albany, said city having made a subscription to the stock of said company to the amount of fifty thousand dollars and upwards, and that the stock thus transferred should be merged in the subscription so made by said city, so that the stock of said city under her then subscription with the stock so transferred should not exceed four hundred thousand dollars so subscribed by her. A copy of the said order as the same remains of record among the records of said company is herewith filed, marked Exhibit "B."

And these defendants further say they did, immediately after the

making of said order by said board of directors, transfer on the
26 books of said railroad company all of said stock so originally subscribed by each of them to said city of New Albany, and the same was merged in the said stock so subscribed by said city except six shares or three hundred dollars ($300) of said stock, which was retained by each of said subscribers. After said transfer was so made, these respondants did not, nor either of them, ever claim more than three hundred dollars of said original stock so subscribed by them, nor did said railroad company, upon its books or otherwise, ever claim or demand of them, or either of them, payment of such subscription of stock over and above said amount of three hundred dollars so subscribed by each of them, which amount they and each of them fully paid; and they are not now, nor is either of them, indebted to said railroad company in any amount whatever.

And these respondants further say that said transfer of said portions of their said stock so originally subscribed by them to said city of New Albany was made before said railroad company had made any contract for work to be done upon its said railroad, or had issued any bonds or obligations whatever, and long before the bonds mentioned in the bill of complaint of the plaintiffs herein were made and issued; and that the stock so merged in the stock so subscribed by the city of New Albany was well known to said city, who acquies'ed therein, and that said city was informed, before and at the time said subscription made by her, that there was such a provision in the articles of association of said railroad company as is before stated, and that the subscribers thereto intended to avail themselves thereof to transfer such portions of their stock to her.

And these respondants further say that no price or consideration whatever was paid or promised to them, or either of them, by said city for the stock so transferred, but that, by mutual understanding and agreement between these respondants, said railroad company and said city, and in accordance with said proviso in their said subscription, their said excess of stock over six shares each was made over to said city as aforesaid as and for so much of said 8,000 shares of stock so subscribed by said city, and that the price thereof was embraced in and formed part of said four hundred thousand dollars ($400,000) assumed and promised by said city as aforesaid; and that said railroad company accepted said subscription and contract of said city as in full satisfaction and discharge of all liability of their respondants, or any of them, upon their said conditional subscriptions to the extent of the price of the stock so made over to the city by them. They say that said stock so made over by them to said city formed, in fact, part of the identical stock so sold by said railroad company to said city, and that the same was by these respondants made over directly to the city for mutual convenience and to avoid the more troublesome process of surrendering, cancelling, and reissuing the same.

And respondants say that, from that time until the time of the commencement of this suit, more than fourteen years elapsed, during all of which time it was never claimed or pretended by said railroad company, or by these complainants, or by any other person, that these respondants, or either of them, were subject to any pecuniary liability whatever in respect of said stock so made over to said city, or in any manner whatever, upon their said subscription.

And these respondants, further answering, say that, besides these respondants and others who are made parties to this suit, the following-

named persons, who are not made parties to this suit, subscribed for stock in said railroad company by subscribing said articles of
27 association and agreeing to pay for the amount of stock set opposite their respective names, at the same time, in the same manner, and upon the same conditions as these respondants did, to wit, Horatio Deval, and Fordyce, under their firm name of Deval and Fordyce, James C. Moody, Jefferson Conner, Nathaniel Moore, Phineas M. Kent, William B. Lent, Benjamin South, and William C. Shipman, under their firm name of Lent, South and Shipman, John Evans, and John Brown, each subscribed five thousand dollars, ($5,000;) William S. Hillyer, Victor A. Pepin, and P. M. Willcox, each subscribed two thousand five hundred dollars, ($2,500;) Joseph A. Moffit, and Charles Van Duzen, each subscribed two thousand, ($2,000;) Thomas Jack, John Loughmiller, Christian Telaru, John Box, Horace B. Wilson, Henry Lake, George H. Ashtree, James Pierce, Milton Gregg, John M. Rawlins, Horatio N. Devol, John W. Childs, each subscribed one thousand dollars. ($1,000;) and William B. Plummer and John Bushnell, under their firm name of Plummer and Bushnell, subscribed five thousand dollars ($5,000.)

These respondants are informed, and believe it to be true, that each of said subscribe's last named, in accordance with said proviso in said articles of associations to that effect, did, in the same manner as these respondants, transfer, each of them, all the stock so subscribed by them, except the amount of three hundred dollars or six shares retained by each of them, to said city of New Albany, and never paid for or claimed any of the stock so transfer'ed. Many, if not all, of said subscribers are solvent, and residents of the State of Indiana.

And these respondants further say that said railroad company is now, and has ever been since said judgment was rendered in 1857, in favor of the persons named in the complainants' bill of complaint, insolvent, and possessed of no property, real or personal, but owes no debt of any kind or to any person, unless it should be held by the court that said company is still indebted for a ballance remaining unpaid upon the said bonds mentioned in the complainants' bill of complaint, and claimed by the complainants to be unpaid in full.

And these respondants, further answering, say that, in reference to the judgment of foreclosure in the Floyd circuit court in 1857, mentioned in the complainants' bill of complaint, and all the proceedings and acts of the parties subsequent thereto, they are informed and believe that the matters stated in the answers of their co-defendant, The City of New Albany, are true, and they adopt said answer in so far as it relates to the same, and aver that each and all the matters and things, in manner and form as therein stated, are true, as fully and effectually as if the same were herein again stated and set forth.

And, further answering, they say that, as to the said suit of the said William Lindly, in said Floyd circuit court, and the proceedings had and final judgment rendered therein, the same are truly stated in the said answer of their co-defendant, The City of New Albany, and they adopt said answer in so far as it relates to said proceedings and final judgment, and aver that the same is true, and that by force of said judgment said complainants, and each of them, are fully and forever barred of their supposed claims in said bill of complaint mentioned.

All of which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court shall direct.

And they humbly pray to be hence dismissed with their reasonable costs in this behalf wrongfully sustained.

T. L. SMITH,
GEORGE V. HOWKS,
HENDRICKS, HORD AND HENDRICKS.
Solicitors for Def'ts.

28 EXHIBIT "A."

Articles of association of the New Albany and Sandusky City Junction Railroad Company.

The undersigned subscribers agree to form a railroad company under the laws of the State of Indiana providing for the incorporation of railroad companies to construct a railroad from the city of New Albany, in said State, to form a junction with the railroad of the Fort Wayne and Southern Railroad Company, and also with the railroad leading from Sandusky City by or near Eaton, in the State of Ohio, to the line dividing the States of Indiana and Ohio, and for that purpose to subscribe and pay for the amount of stock set opposite their respective names.

The corporation to be formed by these articles of association shall be styled The New Albany and Sandusky City Junction Railroad Company. The capital stock of said corporation shall be two millions of dollars, divided into forty thousand shares of fifty dollars each, which capital stock may be increased from time to time if necessary, according to the provisions of the laws of the State providing for the incorporation of railroad companies.

The railroad of said corporation shall be constructed on the nearest practicable rout', and in as direct a course as the nature of the country will permit, diverging from a straight line only for the purposes of securing the most favorable location for the road and such local advantages as may be deemed for the interest of the corporation, from said city of New Albany, through the counties of Floyd, Clark, Scott, Jennings, or Jefferson, or both, as may be found necessary or expedient, Ripley, Franklin, and Union to the said State line, and will be in length, as nearly as can now be ascertained, about one hundred and ten miles.

The affairs of the corporation shall be managed by a board of directors, consisting of thirteen of the stockholders; and the following persons, namely, John S. Davis, Thomas L. Smith, John S. McDonald, James Montgomery, Phineas M. Kent, John B. Winstandley, James C. Moody, James Brooks, Joseph A. Moffitt, Nathaniel Moore, Jefferson Conner, Victor A. Pepin, and John B. Anderson, shall compose said board until the next annual meeting of the stockholders, which shall be held at such time and place as said board shall fix by the bye-laws to be *to be* hereinafter adopted.

In testimony whereof the undersigned subscribers have hereunto set their signatures, with the number of shares and the amount thereof respectively subscribed by them, and their places of residence, at New Albany, in the State of Indiana, this 22d day of August, 1853,

Provided, however, and it is hereby understood, that if the city of New Albany, in its corporate capacity, shall hereafter take stock in this corporation to the amount of fifty thousand dollars or upwards, inasmuch as the present subscribers, being residents of and owning property in said city, will then be under the necessity of contributing still

further to the objects of the corporation by way of taxation, unless a portion of the present subscription is taken off their hands, the said city shall accept in part of the amount to be subscribed in its corporate capacity, at its par value, a transfer of any amount of stock now subscribed for by each individual over and above the amount of six shares or three hundred dollars which each such individual may desire or request shall be so transferred.

29 Names of subscribers.	Place of residence.	No. of shares.	Amount.
James S. Davis	New Albany	100	$5,000
Thomas L. Smith	"	100	5,000
Brooks & Brown	"	100	5,000
John S. McDonald	"	100	5,000
Deval & Fordice	"	100	5,000
James Montgomery	"	50	2,500
Samuel Montgomery	"	50	2,500
William M. Weir	"	100	5,000
Ezekel R. Day	"	100	5,000
Silas C. Day	"	40	2,000
Scribner & Deval	"	50	2,500
James C. Moody	"	100	5,000
W. S. Hillyer	"	50	2,500
Jefferson Conner	"	100	5,000
Victor A. Pepin	"	50	2,500
Thomas Danforth	"	50	2,500
Franklin Warren	"	40	2,000
Plummer & Bushnell	"	100	5,000
W. S. Culbertson	"	50	2,500
John B. Crawford	"	40	2,000
Walter Mann	"	40	2,000
A. Clapp	"	40	2,000
Joseph A. Moffitt	"	40	2,000
Nat. Moore	"	100	5,000
P. M. Kent	"	100	5,000
Lent, South & Shipman	"	100	5,000
George V. Howk	"	50	2,500
John Evans	"	100	5,000
John B. Anderson	"	60	3,000
E. S. Whistler	"	20	1,000
B. E. Scribner	"	20	1,000
Thomas York	"	20	1,000
John Loughmiller	"	20	1,000
James Johnson	"	20	1,000
Cha's Tilson	"	20	1,000
John Box	"	20	1,000
Thomas B. Wilson	"	20	1,000
Henry Lake	"	20	1,000
John F. Anderson	"	30	1,500
P. M. Wilcox	"	50	2,500
John Knefley	"	40	2,000
George H. Ashton	"	20	1,000
Cha's Vandusen	"	40	2,000
James Pierce	"	20	1,000
Milton Gregg	"	20	1,000
J. M. Rawlins	"	20	1,000
H. N. Deval	"	20	1,000
J. W. Childs	"	20	1,000
Kent & Bro's	"	100	5,000
J. B. Winstandly	"	100	5,000
John Brown	"	100	5,000
M. C. Kerr	"	20	1,000
J. P. Smith	"	25	1,250
Augustus Bradley	"	20	1,000
McMahan & Bradley	"	50	2,500

EXHIBIT "B."

SATURDAY EVENING, *December 31st*, 1853.

The board met, pursuant to the adjournment at the last meeting, at the office of the company, at the usual hour. Present, Myers, Davis, Montgomery, Winstandley, Weir, Evans, Moffitt, and Smith.

On motion, it was ordered that the original subscribers to the articles of this company be permitted, in accordance with the stipulations

contained in said articles, to transfer any amount of the stock so originally subscribed by them, over and above the amount of six shares or three hundred dollars, to the city of New Albany, said city having made a subscription to the stock of said company to the amount of fifty thousand dollars and upwards; and that the stock thus transferred be merged in the subscription already made by said city, so that the stock of said city under her present subscription, with the stock so transferred, shall not exceed four hundred thousand dollars, as subscribed by her.

There being no further business, the board adjourned.

JOHN S. DAVIS, *Pres't.*

Attest: THOMAS L. SMITH, *Secretary.*

And afterwards, to wit, at the November term of said court, on the 6th day of November, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled were had, to wit:

Come now the complainants, by Mr. Porter, their solicitor, and file their replication in chancery to the answer of the New Albany and Sandusky City Junction Railroad Company as follows, to wit:

The replic'on of Heman Ely and others, the complainants, to the answer of the said railroad company, defendant:

The repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by the repliants, and these repliants expressly deny each and singular of the facts, statements, defense, matters, and things in said answer contained, except such statements therein as admit the bill of complaint to be true.

All which these repliants are and will be ready to aver and prove, as this honorable court shall direct; and prays as in and by their said bill they have already prayed.

PORTER, HARRISON AND FISHBACK, and
S. BURKE, *Sol's for Comp'ts.*

And afterwards, to wit, at the November term aforesaid of said court, on the 22d day of December, A. D. 1868, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

The parties come by their respective counsel, and, upon leave granted, the defendant The City of New Albany, doth now amend by inserting in her answer the words, "and the question as to the payment and satisfaction of the balance due on said judgment and said bonds being at issue and being tried."

And the plaintiffs now file the general replication in chancery in the words and figures following, to wit:

The replication of Heman Ely and others, the complainants, to the answers of The City of New Albany, Thomas L. Smith, Michael C. Kerr, John S. McDonald, John S. Davis, Horatio N. Deval, Thomas Danforth, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, William Lockmiller, Bela C. Kent, Alexander Kent, John

H. McMahan, Laurence Bradley, James Montgomery, Samuel Montgomery, Walter Mann, George V. Howk, Bradford E. Scribner, John B. Winstandley, Jesse Brown and John B. Windstanly, executors of John Brown, deceased; Augustus Bradley, Jesse J. Brown, Benjamin F. Scribner, Isaac P. Smith, and John F. Anderson.

These repliants, saving and reserving to themselves all and all
31 manner of advantages of exception to the manifold insufficiencies of the said answers, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answers of said defendants *is* uncertain, untrue, and insufficient to be replied unto by these repliants, and these repliants expressly deny each and singular of the facts, statements, defense, matters, and things in said answer contained, except such statements therein as admitted the bill of complaint to be true; all which these repliants are and will be ready to aver and prove, as this honorable court shall direct, and prays as in and by their said bill of complaint they have already prayed.

PORTER, HARRISON AND FISHBACK, and
S. BURKE, *Sol. for Compl'ts.*

And the parties, by their said solicitors, do now agree of record that all the depositions to be taken and read in this cause, shall be taken in all respects in conformity with the practice prevailing in the courts of the State of Indiana.

And this cause is continued.

And afterwards, to wit, at the May term of said court, on the 2d day of June, A. D. 1869, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Now again come the parties by counsel, and thereupon, upon leave of the court, the appearance heretofore entered and the answers heretofore filed on behalf of William Lockmiller, one of the defendants to said bill of complaint, are withdrawn.

And afterwards, to wit, at the May term aforesaid, of said court, on the 1st day of July, A. D. 1869, before the Honorable David McDonald, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

This day come the parties by their respective solicitors, and upon motion of the complainants, Silas C. Day, one of said defendants, is three times called and comes not, but makes default; and it is thereupon shown to the court that said Silas has been duly served with the process of subpœna in chancery more than twenty days prior to the first day of the present term of this court, as appears by the marshal's return in the cause. And the cause, being now called for trial, is submitted upon bill and exhibits, answers and exhibits thereto, replications in chancery, the default aforesaid, and the depositions and other evidence. And argument having been heard, and the court, having been advised, doth now find the equity of the cause to be with the complainants as against the defendants, The New Albany and Sandusky City Junction Railroad Company, The City of New Albany, Silas C. Day, and Ezekiel R. Day. And the court doth further find, as to the other defendants to said bill, the equity of the cause to be with them, the said defendants. And thereupon the court refers this cause to J. D. How-

land, master in chancery, who is instructed to report with all reasonable diligence, first, what amount is due to the several complainants from said railroad company upon the several judgments in their favor, described in the bill of complaint, including interest to the date of report; second, what amount is due from said defendant' Silas C. Day and Ezekiel R. Day, upon their respective subscriptions of stock to said railroad company, including interest to date of report.

32 And thereupon comes John D. Howland, master as aforesaid, and files his report in this case, which is in the words and figures following, to wit:

The master, to whom this cause is referred with directions to ascertain and report the amounts due to the several complainants upon the judgment against said railroad company in the circuit court of Floyd County, and also the amounts due from stock subscriptions to the same company from the defendants Silas Day and Ezekiel R. Day, now respectfully reports that, upon said judgment, including interest to date, there is due to Stevenson Burke twenty-seven thousand eight hundred and eighty-two dollars, ($27,882;) to Heman Ely, as the executor of Charles Arther Ely, eighteen thousand five hundred and twenty-two dollars, ($18,522;) to Heman Ely, fifteen thousand eight hundred and seventy-five dollars, ($15,875;) to John Phelps Putnam, seven thousand nine hundred and thirty-seven dollars, ($7,937)—making in all seventy thousand one hundred and sixteen dollars, ($70,116.) And he further reports that the said parties named, still owe to said railroad company on their stock subscriptions, with interest computed to this date, as follows: Ezekiel R. Day, six thousand two hundred and thirty dollars, ($6,230;) Silas C. Day, three thousand and twenty-six dollars, ($3,026.)

Respectfully submitted.

Decree.

And thereupon this cause came on to be further heard, and the court, being fully advised in the premises, doth order and adjudge that, as to all of said defendants, except said New Albany and Sandusky City Junction Railroad Company, The City of New Albany, Silas C. Day, and Ezekiel R. Day, said bill be dismissed at the costs of the complainants. And the court further finds that there is due to the said Stevenson Burke, upon the judgment described in the bill, and owned by him, the sum of twenty-seven thousand eight hundred and eighty-two dollars, ($27,882;) and that there is due to said Heman Ely, as the executor of the estate of said Charles Arther Ely, deceased, the sum of eighteen thousand five hundred and twenty-two dollars, ($18,522;) and that there is due to said Heman Ely personally, upon the judgment held and owned by him and described in said bill, the sum of fifteen thousand eight hundred and seventy-five dollars, ($15,875;) and that there is due to said John P. Putnam, upon said judgment owned by him and described in the bill of complaint, the sum of seven thousand nine hundred and thirty-seven dollars, ($7,937;) and that all of said several sums of money should draw interest from the first day of July, A. D. 1869. And the court further finds all the allegations, facts, and statements in the bill of complaint to be true, except the allegations of indebtedness of said defendants, other than The City of New Albany, Silas C. Day, and Ezekiel R. Day to said railroad company. And, as between the complainants and said railroad company, and The City of New Albany, the court finds the issue in favor of the complainants. And the court further finds that

there is now due to said railroad company, from said City of New Albany, the sum of one hundred thousand dollars, ($100,000,) and more, upon its subscription for the stock of said railroad company, bonds and interest coupons, as alleged in the bill; and that there is due to said railroad company, from said Ezekiel R. Day, upon his subscription to the stock of said railroad company, as stated in said bill, and his answer, for principal and interest, the sum of six thousand two hundred
33 and thirty dollars, ($6,230;) and that there is due to said railroad company from Silas C. Day the sum of three thousand and twenty-six dollars, ($3,026,) upon his subscription to the stock of said railroad company, as stated in said bill of complaint; and that enough of said several sums of money so found due to said railroad company to satisfy and discharge said several judgments in favor of the complainants, and the costs of this suit, ought in equity to be so applied.

It is, therefore, finally ordered and decreed that The City of New Albany within thirty days pay to the clerk of this court the several amounts found due to the complainants respectively upon said judgments, and also the costs of this suit; and that said defendant Ezekiel R. Day within thirty days pay to the clerk of this court the sum of six thousand two hundred and thirty dollars, ($6,230,) and interest from this date; and that Silas C. Day within thirty days pay to the clerk of this court the sum of three thousand and twenty-six dollars, ($3,026,) and interest from this date; and, in default of the payment of said several sums of money to the clerk of this court by said City of New Albany, Silas C. Day, and Ezekiel R. Day, that execution issue against them severally to collect said several sums so ordered to be paid as upon judgments. It is further ordered that, upon the payment to the clerk of this court by said Ezekiel R. Day and Silas C. Day of the amounts severally found due from them, *that* said sums shall be applied upon the claims of complainants pro rata, and that execution shall issue against said city only for such an amount as may remain unpaid upon said judgments and interest thereon, and costs at the time it is issued; and that, upon payment by said city of the amounts so found due to the complainants by said city, either voluntarily under this order or by process of execution, *that* no execution shall issue against said Days, or either of them. And it is further ordered that all moneys paid to the clerk under this order, or made on execution, shall be applied by the clerk pro rata upon the several judgments in the bill mentioned until all are paid; and that, when said judgment and costs of this suit and interests are fully paid, no further money shall be required to be paid by said defendants, or either of them, under this decree.

Appeal and cross-appeal.

And the defendant The City of New Albany now prays an appeal to the Supreme Court of the United States, which is allowed upon the said defendant executing within ninety days a proper appeal bond in the penalty of eighty thousand dollars, ($80,000,) with surety to be approved by the court.

And the complainants now pray an appeal to the Supreme Court of the United States from so much of the final decree herein as dismisses said bill as against all said defendants, except The New Albany and Sandusky City Junction Railroad Company, The City of New Albany, Ezekiel R. Day, and Silas C. Day, and the same is allowed upon the

execution of a proper appeal bond, with sufficient surety to be approved by the court, in the penalty of five hundred dollars, ($500.)

And afterwards, to wit, at the term last aforesaid, at the court aforesaid, on the 2d day of August, A. D. 1869, the following further proceedings were had in said cause, to wit:

Comes now The City of New Albany and files her bond for an appeal in this cause, with George V. Howk, Aug. Bradly, H. N. Deval,
34 B. F. Scribner, L. Bradley, H. B. Webbe, J. B. Ford, Charles Sackett, R. P. Main, Paul Reissing, Louis Hurrle, B. C. Kent, E. S. Whistler, J. H. Faucett, J. B. Norman, G. C. Cannon, C. H. Meeken, Moses Irwin, Louis Vernia, and Washington C. De Pauw, sureties thereon, and the same is approved by the court, and ordered to be filed herein.

And at the same time come John Phelps Putnam, Heman Ely, and Stevenson Burke, and file their bond for an appeal herein, with Albert G. Porter as surety thereon, and the same is approved by the court, and ordered to be filed herein.

Here follows the evidence introduced on behalf of complainants:

Pleas before the honorable the judge of the Floyd circuit court within the second judicial circuit of the State of Indiana, continued and held by adjournment at the court-house, in the city of New Albany, on the fourteenth day of November, 1857.

Present, Hon. James Collins, sole judge pro tem.

VICTOR A. PEPIN
v.
NEW ALBANY AND S. C. J. R. R. CO., WILLIAM S. PIERSON, &c.

Be it remembered that heretofore, to wit, on the 22nd day of August, 1857, the plaintiff, by his attorneys, filed in the office of the clerk of the Floyd circuit court his complaint herein; which reads in the words and figures following, to wit:

In the Floyd circuit court, October term, 1857.

STATE OF INDIANA, *Floyd County, ss:*

Victor A. Pepin complains of The New Albany and Sandusky City Junction Railroad Company, William S. Pearson, Harvey Seymour, James Montgomery, John S. Davis, William M. Wier, John S. McDonald, Thomas L. Smith, John B. Winstandly, Samuel H. Patterson, Charles Bowman, Charles Howard, and Sebra Howard, defendants, and says that said New Albany and Sandusky City Junction R'road Company executed a mortgage conveying to said defendants Pearson and Seymour, as trustees, as in said mortgage mentioned, sundry tracts of land and lots, in said mortgage described, as security for the payment of one hundred and ten bonds of one thousand dollars each, together with the interest upon the same, at the rate of seven per cent. per annum, payable semi-annually, on July the first and January the first, a duly-certified copy of which mortgage is herewith filed, marked "A," and made part of this complaint.

Said plaintiff would further show that he is the owner and holder of seventeen of the bonds in said mortgage specified, and that no part of the July interest upon the same for the present year has been paid, although payment was duly demanded, but the same now remains wholly due, and amounts to the sum of five hundred and ninety-five dollars; which bonds, together with the interest warrants attached, are also herewith filed, marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, and made part of this complaint.

And said plaintiff would further show that, by a supplemental
35 provision of said mortgage, it is provided that in case the interest upon said bonds shall not be paid when due, then, in that case, said bonds themselves become due and payable, without any benefit from the valuation or appraisement laws of the State of Indiana.

And said plaintiff further shows said defendants Pearson and Seymour do not reside in the State of Indiana, and have taken no steps whatever to collect said interest, or the amount of said bonds, or any part thereof, although requested so to do.

And said plaintiff has been informed and believes that said defendants Montgomery, Lent, Davis, Smith, McDonald, Winstandly, Wier, Patterson, Bowman, Charles Howard, and Sebra Howard, are each the holders and owners of a part of the bonds in said mortgage specified, amounting in all, together with the bonds held by the plaintiff, to the whole number of bonds issued, to wit, one hundred and ten.

Wherefore said plaintiff sues and demands a judgment against said railroad company for twenty-five thousand dollars, the foreclosure of said mortgage, the sale of said mortgaged property, or of so much thereof as may be necessary to pay his said debt, and for all other proper relief in the premises.

VICTOR A. PEPIN,
By OTTO AND DAVIS, *Att'ys.*

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
v.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, William S. Pearson, Harvey Seymour, James Montgomery, William B. Lent, William M. Wier, John S. McDonald, Thomas L. Smith, John B. Winstandly, John S. Davis, Samuel H. Patterson, Charles Bowman, Charles Howard, and Sebra Howard.

The clerk will issue, &c.

OTTO AND DAVIS.

STATE OF INDIANA, *Floyd County, ss:*

John S. Davis, on oath, says that there exists a cause of action, as disclosed in the foregoing complaint against said defendants named in said complaint relating to real estate, and that said defendants are necessary parties thereto; and that said defendants W'm S. Pearson, Harvey Seymour, Charles Howard, and Sebra Howard are not residents of the State of Indiana, as affiant is informed and believes.

JOHN S. DAVIS.

Subscribed to and sworn to before me this the 22nd day of August, 1857.

SALEM P. TOWN, *Clerk*,
By R. M. WIER, *Deputy.*

The exhibit mentioned in the foregoing complaint, and marked "A," reads in the words and figures following, to wit:

36 *New Albany and Sandusky City Junction Railroad Company, William Pearson, jr., and Harvey Seymour.—"Deed of trust."*

This indenture, made this twentieth day of September, one thousand eight hundred and fifty-four, between the New Albany and Sandusky City Junction Railroad Company, a corporation duly constituted as such by the laws of the State of Indiana, of the first part, and William S. Pearson, jr., and Harvey Seymour, of the State of Connecticut, of the second part, witness' that whereas the party of the first part, pursuant to the statutes of said State incorporating said railroad company, and other statutes amendatory thereto, is engaged in constructing its railroad, extending from the city of New Albany, Indiana, to the State line of Ohio, at a point where it intersects and connects with the railroad being constructed by the Sandusky and Louisville Railroad Company, from Huntsville to said State line, said railroad of the party of the first part, being, and to be when completed, about one hundred and ten miles in length, more or less; and whereas said party of the first part being the lawful owner, in fee-simple, of all the real estate, lands, tenements, and hereditaments hereinafter mentioned and described, the same having been conveyed to said party by valid deed duly authenticated and recorded, and clear of all incumbrances in payment of subscriptions to its capital stock, has resolved to raise a sum of money not exceeding one hundred and ten thousand dollars in amount upon a mortgage of said property to the parties of the second part, to aid in the construction of its said railroad, and for that purpose to execute one hundred and ten bonds, for one thousand dollars each, to be negotiated in the city of New York and made payable on the first day of January, one thousand eight hundred and sixty-five, bearing an interest payable semi-annually in the city of New York, without relief from valuation or appraisement laws, and containing a clause permitting the holder thereof to exchange the same at par for shares of stock in said railroad company at any time within five years from the date thereof:

Now, therefore, the said party of the first part, in order to secure the payment of said bonds and interest according to the tenor and effect thereof, and in consideration of one dollar in hand paid at the sealing and delivering hereof by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, transferred, and conveyed, and by these presents does grant, bargain, sell, transfer, and convey, to the said parties of the second part, and to their successors in the trust hereby created and assigned, all of the real estate, land, tenements, and hereditaments situated in the city of New Albany and its vicinity, in the county of Floyd, and State of Indiana, appraised by Victor A. Gepin, Samuel H. Owen, and Augustus Bradley to be of the value of one hundred and fifty-four thousand eight hundred and fifty-five dollars, and more particularly and specifically enumerated and described in a schedule of the same, certified by said appraisers to be of the value aforesaid, hereunto annexed and made part hereof: To have and to hold the said premises, and every part and parcel thereof,

with the appurtenances, unto the parties of the second part, and their successors in said trust, upon the following trust; that is to say, in case the said party of the first part shall fail to pay the principal or any part thereof, or any of the interest on said bonds at any time when the same may become due and payable according to the tenor thereof, when demanded, then, after sixty days from such default, upon request of
37 the holder of such bond, the said parties of the second part, or their successors in said trust, shall enter and take possession of all or any part of said premises, and as the attorneys-in fact are agents of the said party of the first part, by themselves, or agents, or substitutes, duly constituted, have, use, and employ the same, and all the rents, issues, and profits thereof, making from time to time all needful repairs, alterations, and additions thereto, and, after deducting the expenses of such use, repairs, alterations, and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining unpaid, or the said parties of the second part, their successors in said trust, at his or their discretion, may, and, on the request of the holders of at least one-half of said bonds then due and unpaid and unconverted as aforesaid, or whereon any interest may remain due and unpaid, shall, cause the said premises, or so much thereof as shall be necessary to pay and discharge the principal and interest of all such said bonds as may be then due and unconverted as aforesaid, to be sold at public aution in the said city of New Albany, giving at least thirty days' notice of the time, place, and terms of *of* said sale, and of the specific property to be sold, by publishing the same, in one or more newspapers of good circulation published in said city, or in any other newspaper, or by handbills, if deemed necessary by said parties of the second part and their successors in said trust, and execute to the purchaser or purchasers thereof good and sufficient deeds of conveyance, in fee-simple, of the same, which shall be as a bar against the party of the first part, their successors and assignees, and all persons claiming under them, of all rights, interest, and claim in and to said premises so sold and conveyed, or any part thereof; and said parties of the second part, or their successors in said trust, shall, after deducting from the proceeds of said sale the costs and expenses thereof, and of managing said property, apply so much of the proceeds as may be necessary to the payment of said principal and interest due and unpaid on such bonds, and pay over any surplus that may remain to the party of the first part. And it is hereby expressly understood and agreed that in no case shall any claim or advantage be taken of any valuation or appraisement or extension laws by said parties of the first part, nor any injunction or stay of proceedings, or any process be applied for or obtained by said party to prevent such entry or sale as aforesaid. And the said party of the first part hereby covenants, for the consideration aforesaid, to execute and deliver any further reasonable and necessary conveyance or conveyances, to the said parties of the second part, their successors in said trust, or assigns, and any purchaser or purchasers at any sale made by them as aforesaid, for more fully carrying into effect the objects hereof. And the said party of the first part hereby covenants, as aforesaid, that the money borrowed upon the sale of said bonds shall be faithfully applied and used for the construction of their railroad as aforesaid, and for no other purpose.

And it is hereby mutually agreed, and these presents are upon this express condition, that on payment of the principal and interest of said bonds, or the conversion thereof into stock in manner aforesaid, the estate hereby granted to the said party of the second part shall be void,

and the right to the premises and property hereby conveyed shall revert to and revert in the said party of the first part, without any acknowledgement of satisfaction, reconveyance, re-entry, or other act. And it is further mutually agreed that the parties of the second part, and their successors in said trust, shall only be accountable for reasonable diligence in the management of said trust, and shall not be responsible for malfeasance of any agent employed by them where such agent
38 was selected with reasonable discretion, and that they shall be entitled to receive proper compensation for every labor or service performed by them in the discharge of their trust. And it is mutually agreed that, in case of the death, mental incapacity, or resignation of said parties of the second part, or either of them, all of their or his estate, right, interest, power, and control in the premises shall be divested, cease, and determine, and the same shall from thenceforth, for the purposes aforesaid, be vested in, and all and singular the trust and duties hereinbefore enumerated shall devolve upon, such other persons as may be appointed to fill the vacancies thus occasioned in the manner herein prescribed without any other or further assurance or conveyance of or for the same; that is to say, in case either one of said parties of the second part shall become divested of his said trust in the manner aforesaid, the remaining party of the second part shall forthwith nominate and appoint some suitable and proper person to fill the vacancy thus occasioned, and shall deliver to the person thus appointed a certificate in writing to that effect, a copy of which certificate shall be endorsed upon this instrument and recorded in the proper recorder's office in Floyd County, Indiana; and if at any time thereafter a vacancy shall occur, it shall be fil'ed in the same manner by the remaining trustee; and in case, from any cause at any time, there should be no trustee remaining to fill a vacancy thus occasioned, or the remaining trustee should neglect or refuse so to do, the holder of said bonds, or any of them, may apply to the Floyd circuit court setting at New Albany, in the State of Indiana, or any other court of competent jurisdiction in said State, upon a reasonable notice given to the party of the first part, to fill such va cancy or vacancies, and thereupon such new trustee shall become vested with all the rights and interests hereby conveyed and vested in the said parties of the second part, and, if necessary, both or either of the parties hereto shall execute any proper releases or conveyances for that purpose.

And it is further mutually agreed that the party of the first part shall remain in possession of all said granted premises, and of the rents and profit thereof, until default be made in the payment of said bonds or interest; and inasmuch as it may be for the advantage of the parties hereto and the holders of said bonds that portions of the property herein granted should be sold and improved before said bonds mature, the party of the first part may sell any one or more of the lots or tract of land *of land* herein or hereby conveyed to the parties of the second part in trust as aforesaid at a price not less than three-fourths of its appraised value, as affixed in the annexed schedule, or any portion of any of said lots or tracts, at a price which will be not less than a fair proportion of three-fourths of the appraised value of the whole of such lots or tracts, and convey the same to the purchaser or purchasers respectively upon such terms that if the latter shall, at any time before said bonds mature, in good faith procure and deliver to the parties of the second part or their successors, to be cancelled, an amount of said bonds of which the principal shall be equal to the amount of the pur-

chase-money, as above specified, together with all the unpaid coupons belonging thereto; or, if the interest upon all the bonds issued as aforesaid shall be punctually paid when due, and the said purchaser or purchasers shall respectively pay to the parties of the second part or their successors, at the time of the maturity of said bonds, a sum equal to the amount of the purchase-money as above specified for the redemption of said bonds, said purchaser or purchasers respectively shall
39 hold said lots or tracts, or portions of said lots or tract, so respectively paid for by them, free and clear from the lien of this indenture; but no such sale or sales shall be made without the knowledge of the parties of the second part or their successors, nor if they shall object thereto, and said parties of the second part or their successors shall, if they deem it expedient at any time to present the security held by them for the protection of any of said bonds remaining unpaid and uncancelled from being diminished or impaired, entirely prohibit the party of the first part from making such sales, or require such other terms and conditions to be complied with on the part of the party of the first part and any purchasers as they in their discretion shall deem necessary.

In testimony whereof the said company has caused its corporate seal to be hereto affixed and these presents to be signed by its president and countersigned by its secretary the day and year first above mentioned.

[L. S.] JAMES MONTGOMERY, *President.*

Countersigned: THOMAS L. SMITH, *Secretary.*

Schedule particularly describing the several parcels of property conveyed in the foregoing deed of trust, with the value affixed to each by the appraisers.

1.—All that part of lots Nos. one and two on Lower Water street, in the city of New Albany, beginning forty-five west from State street, extending thence westwardly on said Water street twenty-five feet, and back therefrom the same width one hundred and eight feet to a twelve-foot alley, with the right in common with the other owners of parts of said lots one and two to the use of said alley; valued at $1,800

2.—All those lots in the city of New Albany known in Day's Mount Isham plat of a part of said city as lots Nos. forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, and fifty, fronting on Upper First street in said city; valued at $24 per foot $8,040

3.—All those lots in the city of New Albany known in Day's Mount Isham plat as the lots. Nos. sixty-six, sixty-seven, and sixty-eight, in Upper Second street in said city; valued at $22 per foot $2,970

4.—All those lots in the city of New Albany in Day's Mount Isham plat as lots Nos. sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-nine, seventy, and seventy-one, fronting on the old Vincennes road in said city; valued at $40 per foot $8,000

5.—All those lots in the city of New Albany as lots Nos. forty-one, forty-two, forty-three, forty-four, forty-five, on Ferry street, (Noyes and Cline's plat;) valued at $260 each $1,300

6.—The south half of lot No. twenty-six, in Day's Reimeking's plats, being thirty feet in front by one hundred and twenty feet deep, on the west side of Lower Fifth street, in the city of New Albany, with appurtenances; valued at..... $1,200

7.—The west half of the southeast quarter of section No. six, town., three south, range six east, in the county of Floyd, State of Indiana, containing eighty-acres; valued at $4 per acre..... $320

8.—All those lots known as Nos. one, three, and five, Upper First street, in the city of New Albany; valued at $75 per foot..... $11,250

40 9.—The undivided half of lot No. twenty-eight, on Upper Fourth street, in the city of New Albany; valued at..... $1,000

10.—Lots Nos. two and three, on Beach street, in block C, of plat No. 20, in New Albany; valued at..... $500

11th.—A tract of land bounded by a line beginning at a stake in the southeast corner of lot No. three on the map of the city of New Albany, at the east corner of land of Samuel Wilcox, deceased, and running thence N. $\frac{1}{2}$° W. seventy-two and two-thirds poles to a stake; thence south 49° W. forty-six poles to a stake; thence S. $\frac{1}{2}$° E. seventy-two poles to a stone; thence N. $\frac{1}{2}$° E. forty-six poles to the place of beginning; being in the vicinity of the city of New Albany, and containing 20 acres and 142 perches; valued at $200 per acre..... $4,000

12.—A tract of land beginning at a stake in the said east corner of the land of Samuel Wilcox, deceased, mentioned in the discription next above, and bounded by a line running thence S. 49° W. 189 feet; thence N. 41$\frac{1}{2}$° 393$\frac{56}{100}$ feet, to the centre of the Silver Creek road; thence along said road southwardly 206$\frac{68}{100}$ feet; thence S. 41$\frac{1}{2}$° E. 297 feet to the place of beginning—being near the city of New Albany, and containing one and a half acres; valued at..... $300

13.—Lots Nos. fifty-three, fifty-five, and the west half of fifty-seven on Spring street, (Conner's plat,) in the city of New Albany; valued $800 each lot..... $2,000

14.—All that tract of land in the city of New Albany known as lot No. 27 of survey No. 29 in the Illinois grant, containing 11$\frac{91}{100}$ acres, being all that part of the Edwards plat of 16 acres which lies southward of the plank road to Jeffersonville; valued at $100 per acre..... $8,400

15.—A tract of land situated in Floyd County, Indiana, near the city of New Albany, known as a part of the east half of southeast quarter of section thirty-three in town. 2 south of R. 6. E.; bounded by a line beginning on the Boiling Spring road, on the line between Gaudy and Thomas Sinex; running thence with said line to the line of John P. Frank's land; thence westwardly along said line to the line of W'm Drysdale's land; thence southwardly along said line until it strikes the line of land conveyed by Gaudy to Wright; thence eastwardly along said eastern line to the line of the Boiling Spring road; thence along said road ten feet to the place of beginning, containing thirty acres more or less; valued at $200 per acre..... $6,000

16.—Lots Nos. one, two, three, and four, on Scott street, in

Moore's plat of a part of the city of New Albany; valued at $250 each $1,000

17.—Lots Nos. ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, and eighteen, on Jackson street, in Moore's plat of a part of the city of New Albany; valued at $250 each 2,250

18.—All that block or square numbered seven in the plat of the sub-division of the White Hill tract, in the city of New Albany; and also all that part of the Ohio River bank which lies immediately in front of said block or square between the lines produced by the extension of Upper Fifteenth street, and extending from the south line of Water street to low-water mark; valued at $9,000

41 19.—A part of lot No. two on Lower Water street, in the city of New Albany, beginning at a point on said Water street, twenty-five feet east from the southwest corner of said lot, extending thence eastwardly on said street 25 feet, and running back from said street the same width one hundred and eight feet to a twelve-foot alley, with the use of said alley in common with all other owners of adjoining lots; valued at $1,800

20.—The north half of lot No. 8, on State street, in the city of New Albany, being twenty-five feet in front on said street, extending back therefrom the same width one hundred and twenty feet, with the three-story brick store and warehouse covering the same, and valued at $6,000

21.—A tract of land in the city of New Albany, part of the N. W. $\frac{1}{4}$ of fractional section No. 10, in town. 3 S., R. 6 E., marked letter "C" on plat No. 15, and on the city map, containing seventeen acres; valued at $235 per acre $4,000

22.—All of lots numbers seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four, on Poplar street, in plat No. 20, in the city of New Albany; valued at $225 each $1,800

23.—All the lots Nos. thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, and thirty-seven, on Elue street, in plat No. 20 of the city of New Albany; valued at $225 each $1,800

24.—All the lots numbers twenty-five, twenty-six, twenty-seven, twenty-eight, and twenty-nine, on Shipping street, in plat No. 20 of the city of New Albany; valued at $225 each $1,125

25.—All those parts of lots, with the appurtenances, being seventy-six feet in front off the eastwardly side of lot number thirty-nine, on Lower High street, in the city of New Albany, and thirteen feet in front off the westwardly side of lot number thirty-seven, on the same street, both parts of said lots making thirty-nine feet front on said Lower High street, extending the same width ninety feet, having thereon two brick dwelling-houses; valued at $1,500 each tenement $3,000

26.—A tract of land in the city of New Albany, being the north half of that part of the northwest quarter of section thirty-four, in town. 2 S., range 6 E., lying west of the Vincennes plank-road, except one $\frac{32}{100}$ acres, deed to George

Lyman, containing eighty acres, more or less; valued at $400 per acre $32,000

27.—A tract of land in the city of New Albany, being all that part of letter "H" in number 42 of the Illinois grant, which, beginning at a stake on the east side of Vincennes street, on plat number 63, 450 feet north from the north line of Beeler street, runs thence north 40° W. 480 feet to what is called the Beech farm, (letter "C";) thence N. 50° E. 1,419 feet to a small beech tree in the southeastern corner of said Beech farm; from thence south 40° E. 480 feet to a stake; thence south 50° W. 1,419 feet to the place of beginning, containing $15\frac{63}{100}$ acres; valued at $18,000

28.—The undivided one-third part of that out-lot in the city of New Albany known as lot No. 15, in the northern quarter of section No. 34, town. 2 S., R. 6 E., containing $19\frac{56}{100}$ acres; valued at $4,000

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29.—The north half of lot number twenty-seven, on Upper First street, in the city of New Albany, being twenty-five feet in front on said street, and extending back the same width, one hundred and twenty feet; valued at $2,000

30.—The north half of lot No. two, on State street, in the city of New Albany, being twenty-five feet in front on said street, and extending back same width one hundred and twenty feet; valued at $2,000

31.—All those lots in the city of New Albany comprised in all of lot No. one, in Clarke and Elderkin's plat of part of letter "E," in No. 28, in the Illinois grant; that part of letter "D," in Lindley and Day's east plat, when said street shall be opened sixty feet wide; thence running N. 40° W. with said produced line of East street, 60 feet wide, 559 feet, more or less; thence 50° E. 16 feet, more or less, to the northwest corner of said lot No. 1; thence S. 40° E. with the line of the Chambers tract, 563 feet, more or less, to the place of beginning; and also the right and interest held by grantors in and to the 30 feet of ground by 559 feet in length, adjoining the land last above-described, which is to form the half of said East street; valued at $8,000

—making the value of the whole $154,855

The undersigned, having been requested to appraise the several parcels of land described in the foregoing schedule, do hereby certify that they have carefully examined the same, and have affixed to them respectively the sums therein specified, amounting to one hundred and fifty-four thousand eight hundred and fifty-five dollars, which they believe to be their fair value at this time, at the current selling rates of land in the city of New Albany and its vicinity, of the same quality, and similarity situated.

New Albany, Ind, September 15th, 1854.

VICTOR A. PEPIN. [L. S.]
SAMUEL H. OWEN. [L. S.]
AUGUSTUS BRADLEY. [L. S.]

STATE OF INDIANA, *Floyd County, set:*

The undersigned, a notary public in and for said county, does hereby certify that Victor A. Pepin, president of the Merchants and Mechanics' Bank of this city; Samuel H. Owen, recorders of deeds; and Augustus Bradley, auditor of said county, are personally known to me; that the above are their genuine signatures, and that they are all gentlemen of character, respectability, property, and well acquainted with the value of real estate in this city and vicinity.

Witness my hand and official seal hereunto affixed at the city of New Albany, this 15th day of September, 1854.

[L. S.] ELIJAH SABIN, *N. P.*

STATE OF INDIANA, *Floyd County, set:*

This day personally appeared before me the recorder of deeds
43 in and for said county, James Montgomery, president, and Thomas L. Smith, secretary of the New Albany and Sandusky City Junction Railroad Company, and acknowledged that they had signed the foregoing indenture, and affixed its corporate seal thereto as and for their act and deed of said company.

In testimony whereof I have hereunto affixed my signature and official seal this 20th day of September, 1854.

[L. S.] SAMUEL H. OWEN,
Recorder Floyd Co.

RECORDER'S OFFICE,
September 20th, 1854.

STATE OF INDIANA, *Floyd County, set:*

I, Sam'l H. Owen, recorder of said county, do certify that the foregoing mortgage was filed for record and recorded this 20th day of Sept., 1854, at 6 o'clock a. m., in mortgage record, vol. 1, pages 341, 342, 343, 344, 345, 346, 347, 348.

Witness my hand and official seal.

[L. S.] SAMUEL H. OWEN.

New Albany and Sandusky Junction R. R. Company—Supplemental agreement to No. 643.

William G. Pearson, jr., and Harvey Seymour, October 7th, 1854—Supplemental agreement.

It is further hereby agreed by the parties to the foregoing indenture, in consideration of the premises therein mentioned before the sale of any of the bonds secured thereby, and to facilitate the sale of said bonds, that, if the party of the first part shall at any time be in default in the payment of the principal or interest of any of said bonds, according to the tenor and effect thereof, then the principal of all said bonds shall forthwith become due and payable from the time of such default; and any suit or action in law or equity may be commenced against the said party of the first part to recover or collect said principal and interest thereon in the same manner as if this promise and agreement were included in and made a part of said bonds; and after sixty days from such default, the said parties of the second part shall take possession of all the premises described in said indenture, and, at their discretion, use or sell the same, for the payment of all or any of said bonds, and the interest thereon.

In testimony whereof the said company has caused its corporate seal

to be hereto affixed, and these presents to be signed by its president and countersigned by its secretary this Oct. 7th, 1854.

[L. S.] J. MONTGOMERY, *President.*

THOMAS L. SMITH, *Secretary.*

STATE OF INDIANA, *Floyd County, set:*

This day personally appeared before me, the recorder of deeds in and for said county, James Montgomery, president, and Thomas L. Smith, secretary of the New Albany and Sandusky City Junction Railroad Company, and acknowledged that they had signed the foregoing supplemental agreement, and affixed its corporate seal thereto as and for the act and deed of the said company.

{ SEAL'S } { PLACE. } In testimony whereof I have hereunto affixed my signature and official seal this seventh day of October, 1854.

SAMUEL H. OWEN.

44 Filed for record of supplemental agreement this 7th day of October, 1854, at 4 o'clock p. m., and recorded in mortgage record, vol. 1, page' 359 and 360.

SAMUEL H. OWEN, *Recorder F. C.*

STATE OF INDIANA, *Floyd County, set:*

I, James G. Harrison, recorder of said county, hereby certify that the within is a true, full, and complete copy of a mortgage, and also of a supplemental mortgage, recorded in book of mortgages, vol. 1, pages 341, 342, 343, 344, 345, 346, 347, 348, and 359, & 360, as appears on record at this office.

Witness my hand and official seal this 20th day of August, 1857.

[L. S.] JAMES G. HARRISON,
Recorder Floyd County.

The bonds marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, mentioned in the plaintiff's complaint, were not filed therewith.

And afterward, at the October term of the said Floyd circuit court, on the 14th day of November, 1857:

Comes now the plaintiff, by his attorneys, and on his motion it is ordered that this action be dismissed as to the said John B. Winstandly and Charles Bowman; and, on his further motion, the said Walter N. Mann, Charles B. Applegate, and William B. Lent are made parties defendant hereto. And said last-named defendants now come, by their attorneys, and enter their appearance to this action, and a rule is awarded against all said defendants to answer herein; and thereupon comes said railroad company, by her attorneys, and files her answer herein, admitting the execution and delivery of the bonds and mortgage herein sued upon, and asks that said mortgage may be foreclosed; and said other defendants, except said Winstandly and Bowman, also file their answers herein; which read in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, W'm S. Pearson, and others.

James Montgomery, one of said defendants in this suit, answers the

complaint of said plaintiff, and says that he admits the making of said bonds and the giving of the mortgage, as stated in the complaint; and he also states that he is the holder and owner of six of those bonds for one thousand dollars each, together with the unpaid interest upon the same, amounting to one thousand and fifty dollars—in all, the sum of seven thousand and fifty dollars; which bonds are numbered 44, 45, 46, 47, 48, and 108, and are due and unpaid. Wherefore said Montgomery prays that said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made a part of this answer.

OTTO AND DAVIS.
Attorneys for Montgomery.

45 The bonds mentioned in the foregoing answer were not filed with the same.

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, W'm J. Pearson, and others.

John S. Davis, one of the defendants in this suit, answers the complaint herein, and says he admits the making of all said bonds and giving the mortgage as stated in the complaint, and further states that he is the holder and owner of six of said bonds for one thousand dollars each, together with the unpaid interest warrants upon the same, amounting to the sum of one thousand and fifty dollars, making in all the sum of seven thousand and fifty dollars; which bonds are numbered 24, 25, 26, 27, 28, and 110, and are wholly unpaid, as well as the interest thereon, and he therefore prays that said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and unpaid interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS, *Attorneys.*

(The bonds mentioned in the foregoing answer were not filed therewith.)

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
N. A. AND S. C. J. R. R. CO. ET AL.

William M. Wier, one of the defendants in this action, answers the complaint herein, and says he admits the making of all said bonds and giving the mortgage to secure their payment, as is alleged in said complaint. He further says he is the holder and owner of five of those said bonds for one thousand dollars each, to wit, Nos. 62, 63, 64, 65, and 66, together with the unpaid interest warrants upon the same, amounting together to five thousand eight hundred and seventy-five dollars, which are unpaid. Wherefore he asks judgment for six thousand dol-

lars, and for the foreclosure of the mortgage and the sale of the property, or so much thereof as may be necessary to satisfy his debt, and for other proper relief.

Said bonds and interest warrants are herewith filed and made part hereof.

HOWK AND WIER, *Attorneys.*

(The bonds mentioned in the foregoing answer were not filed therewith.)

46 In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, W'm S. Pearson, and others.

John S. McDonald, one of the defendants in this suit, answers the complaint herein, and says he admits the making of the bonds and giving the mortgage, as stated in the complaint, and states that he is the holder and owner of five of said bonds for one thousand dollars each, together with the unpaid interest-warrants upon the same, amounting to eight hundred and seventy-five dollars, making in all the sum of five thousand eight hundred and seventy-five dollars, which bonds are numbered fifty-seven, fifty-eight, fifty-nine, sixty, and sixty-one, and are all due and unpaid. Wherefore said McDonald prays that said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS,
Attorneys for McDonald.

(The bonds mentioned in the foregoing answer were not filed therewith.)

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY C. J. R. R. Co. et al.

Thomas L. Smith, one of the defendants in this suit, for answer to the plaintiff, says he admits the making of said bonds and mortgage as stated in said complaint. He further states that he is the holder and owner of five of said bonds for one thousand dollars each, with the unpaid interest-warrants thereupon, amounting to eight hundred and seventy-five dollars, making in all five thousand eight hundred and seventy-five dollars. Said bonds are numbered 29, 30, 40, 41, and 42, and are due and unpaid. He therefore prays said mortgaged property may be sold to satisfy the same, and for all other proper relief.

Said bonds and coupons are filed herewith and made part hereof.

SMITH AND KERR,
Attorneys f. T. L. Smith.

(Said bonds mentioned in the foregoing answer were not filed therewith.)

The Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Samuel H. Patterson, one of the defendants in this suit, answers
47 the complaint herein, and says he admits the making of all said bonds and giving the mortgage as stated in the complaint, and states that he is the holder and owner of one of said bonds for one thousand dollars, together with the unpaid interest-warrants upon the same, amounting to the sum of one hundred and seventy-five dollars, which bond is numbered 72, and is due and unpaid. Therefore said Patterson prays that said mortgaged lands be sold to satisfy the same, and for all other proper relief in the premises.

Said bond and interest warrant are herewith filed and made part hereof.

OTTO AND DAVIS,
Attorneys.

(The bond mentioned in the foregoing answer was not filed therewith.)

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
NEW ALBANY AND SANDUSKY CITY J. R. R. Co. et al.

Said Charles Howard and Sebra Howard, defendants in this suit, for answer to the complaint of said plaintiff say they admit the making said bonds and the execution of said mortgage. They further say that sixty-seven of said bonds, with the coupons attached, were paid to them by said company, and received by them as part payment of work done by them under a contract for the construction of the railroad of said company. They further say that all of said sixty-seven bonds were sold by them for a full and adequate consideration, and they believe the following persons are now the bona-fide holders and owners of the same, to wit:

Victor A. Pepin	12	of	said	bonds	and	coupons.
John Phelps Putnam	6	"	"	"	"	$6,210
John Phelps Putnam, trusteee of Samuel T. Anderson and wife.	3	"	"	"	"	$3,105
Sarah Coit Day	5	"	"	"	"	$5,175
Elijah De Witt	7	"	"	"	"	$7,245
G. R. and H. C. Starr	4	"	"	"	"	$4,140
Herman Ely	8	"	"	"	"	$8,280
C. Arthur Ely, by his ag't Herman Ely	14	"	"	"	"	$14,490
Augustus H. Moss	1	"	"	"	"	$1,035
Samuel H. Patterson	1	"	"	"	"	$1,035
Walter Mann	1	"	"	"	"	$1,035
Rollin C. De Witt	5	"	"	"	"	$5,175
	67					

All of said bonds are for one thousand dollars each, and these respondents disclaim any further interest and prays that said mortgaged property may be sold to pay said persons the principal and interest due on said bonds.

SMITH AND KERR,
Attorneys for C. & S. Howard.

48 In the Floyd circuit court, October term, 1861.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, W'm S. Pearson, and others.

Charles B. Applegate, one of the defendants herein, hereby enters his appearance, and answers the complaint of said plaintiff, and says that he admits the making of all those said bonds and the giving of the mortgage, as stated in the complaint; and he also states that he is the holder and owner of six of those bonds for one thousand dollars each, together with the unpaid interest warrants thereupon, amounting to the sum of one thousand and fifty dollars, making in all the sum of seven thousand and fifty dollars; which bonds are numbered 43, 49, 54, 55, 56, and 109, and are due and unpaid. Wherefore said Applegate prays that said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS,
Attorneys for Applegate.

(The bonds mentioned in the foregoing answer were not filed therewith.)

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, W'm S. Pearson, et al.

William B. Lent, one of the defendants in this suit, answers this complaint, and says that he admits the making of the said bonds and giving the mortgage, as stated in the complaint, and states that he is the holder and owner of five of said bonds for one thousand dollars each, together with the unpaid interest warrants on the same, amounting to the sum of eight hundred and seventy-five dollars, making in all the sum of five thousand eight hundred and seventy-five dollars; which bonds are numbered 67, 68, 69, 70, and 71, and are due and unpaid. Wherefore said Lent prays that the said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS,
Attorneys for Lent.

(Said bonds mentioned in the foregoing answer were not filed therewith.)

(The answers of defendants William S. Pearsons, jr., Harvy Seymour, and Walter Mann cannot be found amongst the files.)

49 And this cause being at issue is, by the consent of parties for trial, submitted to the court without the intervention of a jury; and the court, having fully heard and examined the allegations of the parties and the proofs adduced, finds that the said New Albany and Sandusky City Junction Railroad Company, by reason of said bonds and mortgage, is indebted to William S. Pearson, jr., and Harvey Seymour, as trustees in trust for the use and benefit of the for the following persons in the following sums, to wit: six thousand two hundred and ten dollars, for the use of John Phelps Putnam; in the sum of three thousand one hundred and five dollars, for the use of Samuel J. Anderson and wife; in the sum of five thousand one hundred and seventy-five dollars, for the use of Sarah Coit Day; in the sum of seven thousand and two hundred and forty-five dollars, for the use of Elijah De Witt; in the sum of five thousand one hundred and seventy-five dollars, for the use of Rollin C. DeWitt; in the sum of four thousand one hundred and forty dollars, for the use of G. R. and H. C. Starr; in the sum of eight thousand two hundred and eighty dollars, for the use of Herman Ely; in the sum of fourteen thousand four hundred and ninety dollars, for the use of C. Arthur Ely; and in the sum of one thousand and thirty-five dollars, for the use of Augustus H. Moss—making in the aggregate the sum of fifty-four thousand eight hundred and fifty-five dollars; and that said company is indebted to the plaintiff, by reason of the said bonds and mortgage, in the sum of eighteen thousand two hundred and ninety-five dollars, and to the other said defendants, except the said Winstandley and Bowman, severally in the following amounts, namely: to said Walter Mann, in the sum of one thousand and thirty-five dollars; to the said Samuel H. Patterson, in the sum of one thousand and thirty-five dollars; to the said John S. Davis, in the sum of seven thousand and *and* fifty dollars; to the said Thomas L. Smith, in the sum of five thousand eight hundred and seventy-five dollars; to the said Charles B. Applegate, in the sum of seven thousand and fifty dollars; to the said James Montgomery, in the sum of seven thousand and fifty dollars; the said John S. McDonald, in the sum of five thousand eight hundred and seventy-five dollars; to the said William M. Wier, in the sum of five thousand eight hundred and seventy-five dollars; and to the said William B. Lent, in the sum of five thousand eight hundred and seventy-five dollars—each of said sums aforesaid to be levied and collected without any relief from valuation or appraisement laws; and that the mortgage herein sued upon was executed on said railroad company to secure the payment of said several sums and that said mortgage ought to be foreclosed.

It is now, therefore, finally considered and decreed by the court that the said William S. Pearson, jr., and Harvey Seymour, as such trustees, and for the use aforesaid, do recover of said company the said sums of fifty-four thousand eight hundred and fifty-five dollars and costs of suit; and that the said Victor A. Pepin recover of said company the sum of eighteen thousand two hundred and ninety-five dollars and costs of suits; and that the said Walter Mann and Samuel H. Patterson do, each of them, recover of said company the said sum of ten hundred and thirty-five dollars and the costs; and that the said Charles B. Applegate and James Montgomery and John S. Davis do each recover of said com-

All of said bonds are for one thousand dollars each, and these respondents disclaim any further interest and prays that said mortgaged property may be sold to pay said persons the principal and interest due on said bonds.

SMITH AND KERR,
Attorneys for C. & S. Howard.

48 In the Floyd circuit court, October term, 1861.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, W'm S. Pearson, and others.

Charles B. Applegate, one of the defendants herein, hereby enters his appearance, and answers the complaint of said plaintiff, and says that he admits the making of all those said bonds and the giving of the mortgage, as stated in the complaint; and he also states that he is the holder and owner of six of those bonds for one thousand dollars each, together with the unpaid interest warrants thereupon, amounting to the sum of one thousand and fifty dollars, making in all the sum of seven thousand and fifty dollars; which bonds are numbered 43, 49, 54, 55, 56, and 109, and are due and unpaid. Wherefore said Applegate prays that said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS,
Attorneys for Applegate.

(The bonds mentioned in the foregoing answer were not filed therewith.)

In the Floyd circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, W'm S. Pearson, et al.

William B. Lent, one of the defendants in this suit, answers this complaint, and says that he admits the making of the said bonds and giving the mortgage, as stated in the complaint, and states that he is the holder and owner of five of said bonds for one thousand dollars each, together with the unpaid interest warrants on the same, amounting to the sum of eight hundred and seventy-five dollars, making in all the sum of five thousand eight hundred and seventy-five dollars; which bonds are numbered 67, 68, 69, 70, and 71, and are due and unpaid. Wherefore said Lent prays that the said mortgaged lands may be sold to satisfy the same, and for all other proper relief in the premises.

Said bonds and interest warrants are herewith filed and made part hereof.

OTTO AND DAVIS,
Attorneys for Lent.

(Said bonds mentioned in the foregoing answer were not filed therewith.)

(The answers of defendants William S. Pearsons, jr., Harvy Seymour, and Walter Mann cannot be found amongst the files.)

And this cause being at issue is, by the consent of parties for
49 trial, submitted to the court without the intervention of a jury; and the court, having fully heard and examined the allegations of the parties and the proofs adduced, finds that the said New Albany and Sandusky City Junction Railroad Company, by reason of said bonds and mortgage, is indebted to William S. Pearson, jr., and Harvey Seymour, as trustees in trust for the use and benefit of the for the following persons in the following sums, to wit: six thousand two hundred and ten dollars, for the use of John Phelps Putnam; in the sum of three thousand one hundred and five dollars, for the use of Samuel J. Anderson and wife; in the sum of five thousand one hundred and seventy-five dollars, for the use of Sarah Coit Day; in the sum of seven thousand and two hundred and forty-five dollars, for the use of Elijah De Witt; in the sum of five thousand one hundred and seventy-five dollars, for the use of Rollin C. DeWitt; in the sum of four thousand one hundred and forty dollars, for the use of G. R. and H. C. Starr; in the sum of eight thousand two hundred and eighty dollars, for the use of Herman Ely; in the sum of fourteen thousand four hundred and ninety dollars, for the use of C. Arthur Ely; and in the sum of one thousand and thirty-five dollars, for the use of Augustus H. Moss—making in the aggregate the sum of fifty-four thousand eight hundred and fifty-five dollars; and that said company is indebted to the plaintiff, by reason of the said bonds and mortgage, in the sum of eighteen thousand two hundred and ninety-five dollars, and to the other said defendants, except the said Winstandley and Bowman, severally in the following amounts, namely: to said Walter Mann, in the sum of one thousand and thirty-five dollars; to the said Samuel H. Patterson, in the sum of one thousand and thirty-five dollars; to the said John S. Davis, in the sum of seven thousand and *and* fifty dollars; to the said Thomas L. Smith, in the sum of five thousand eight hundred and seventy-five dollars; to the said Charles B. Applegate, in the sum of seven thousand and fifty dollars; to the said James Montgomery, in the sum of seven thousand and fifty dollars; the said John S. McDonald, in the sum of five thousand eight hundred and seventy-five dollars; to the said William M. Wier, in the sum of five thousand eight hundred and seventy-five dollars; and to the said William B. Lent, in the sum of five thousand eight hundred and seventy-five dollars—each of said sums aforesaid to be levied and collected without any relief from valuation or appraisement laws; and that the mortgage herein sued upon was executed on said railroad company to secure the payment of said several sums and that said mortgage ought to be foreclosed.

It is now, therefore, finally considered and decreed by the court that the said William S. Pearson, jr., and Harvey Seymour, as such trustees, and for the use aforesaid, do recover of said company the said sums of fifty-four thousand eight hundred and fifty-five dollars and costs of suit; and that the said Victor A. Pepin recover of said company the sum of eighteen thousand two hundred and ninety-five dollars and costs of suits; and that the said Walter Mann and Samuel H. Patterson do, each of them, recover of said company the said sum of ten hundred and thirty-five dollars and the costs; and that the said Charles B. Applegate and James Montgomery and John S. Davis do each recover of said com-

pany the said sum of seven thousand and fifty dollars each and their costs; and that the said Thomas L. Smith, John S. McDonald, William M. Wier, and William B. Lent do each recover of said company the said sum of five thousand eight hundred and twenty-five dollars with their costs, each of the sums aforesaid to be levied and collected as aforesaid; and that said mortgage be foreclosed, and said
50 mortgaged premises, or so much thereof as may be necessary to pay said several sums, with interest and all costs, shall be sold as hereinafter ordered and directed; and that upon the sale and conveyance of any of said mortgaged premises, as hereinafter provided, the equity of redemption of said railroad company in and to the same be forever barred and foreclosed.

Said mortgaged premises are described as follows, to wit:

1st. All that part of lots Nos. one and two on Lower Water street, in the city of New Albany, beginning forty-five feet west from State street; extending thence westwardly on said Water street twenty-five feet, and back therefrom, the same width, one hundred and eight feet to a twelve-foot alley, with the rights in common with the other owners of parts of said lots one and two to the use of this said alley.

2nd. All those lots in the city of New Albany known in Day's Mount Isham plat of a part of said city as lots Nos. forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, and fifty, fronting on Upper First street in said city.

3rd. All those lots in the city of New Albany, known in Day's Mount Isham plat as lots Nos. sixty-six, sixty-seven, and sixty-eight, on Upper Second street in said city.

4th. All those lots in the city of New Albany, known in Day's Mount Isham plat as lots Nos. sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-nine, seventy, and seventy-one, fronting on the old Vincennes road in said city.

5th. All those lots in the city of New Albany, known as lots Nos. forty-one, forty-two, forty-three, forty-four, forty-five, on Ferry street, (Noyes and Cline's plat.)

6th. The south half of lot No. twenty-six, in Day's Reineking plat, being thirty feet in front by one hundred and twenty feet deep, on the west side of Lower Fifth street, in the city of New Albany, with appurtenances.

7th. The west half of the southeast quarter of section No. six, town. three, range six east, in the county of Floyd, and State of Indiana, containing eighty acres.

8th. All those lots known as Nos. one, three, and five, on Upper First street, in the city of New Albany.

9th. The undivided half of lot No. twenty-eight on Upper Fourth street in the city of New Albany.

10th. Lots Nos. two and three on Beech street, in block 6 of plat 20, in the city of New Albany.

11th. A tract of land bounded by a line beginning at a stake on the southeast corner lot No. three, on the map of the city of New Albany, at the east corner of the land of Samuel Wilcox, deceased; and running thence N. 42° W. seventy-two and two-thirds poles to a stake; thence S. 49° W. forty-six poles to a stake; thence S. 42° E. seventy-two poles to a stone; thence N. 49° E. forty-six poles to the place of beginning—being in the vicinity of New Albany, and containing 20 acres and 142 perches.

12th. A tract of land beginning at a stake in the said east corner of the land of Samuel Wilcox, deceased, mentioned in the description next

above, and bounded by a line running thence S. 49° W. 189 feet; thence N. 41½° W. 373 56/100 feet to the centre of the Silver Creek road; thence along said road southwardly 206 58/100 feet; thence S. 41½° E. 297 feet to the place of beginning—being near the city of New Albany, and containing one and a half acres.

51 13th. Lots Nos. fifty-three, fifty-five, and the west half of fifty-seven, on Spring street, (Conner's plat,) in the city of New Albany.

14th. All that tract of land in the city of New Albany, known as lot No 27 of survey No. 29, in the Illinois grant, containing 11 90/100 acres, being all that part of the Edwards plat of 18 acres which lies southward of the plank-road to Jeffersonville.

15th. A tract of land situated in Floyd County, Indiana, near the city of New Albany, known as a part of the east half of the S. E. quarter of section 33, in town. 2 S., of R. 6 E., bounded by a line beginning on the Boiling Spring road on a line between Gaudy and Thomas Sinex; runni'g thence with the said line to the line of John P. Frank's land; thence westwardly along said line to the line of William Drysdale's land; thence southwardly along said line until it strikes the line of land heretofore conveyed by Gaudy to Wright; thence eastwardly along said eastern line to the line of the Boiling Spring road; thence along said road ten feet to the place of beginning—containing thirty acres more or less.

16th. Lots Nos. one, two, three, and four, on Scott street, in Moore's plat, in the city of New Albany.

17th. Lots Nos. ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, and eighteen, on Jackson street, in Moore's plat of a part of the city of New Albany.

18th. All that block or square numbered seven in the plat of the subdivision of the Whitehill tract, in the city of New Albany, and also all that part of the Ohio River bank which lies immediately in front of said block or square, between the line produced by the extension of Upper Fifteenth and Upper Sixteenth streets, and extending from the south line of Water street to low-water mark.

19th. A part of lot No. two on Lower Water street, in the city of New Albany, beginning at a point on said Water street twenty-five feet east from the southwest corner of said lot, extending eastward on said street twenty-five feet, and running back the same width one hundred and eight feet to a twelve-foot alley, with the right to the use of said alley in common with owners of adjoining lots.

20th. The north half of lot No. 8 on State street, in the city of New Albany, being twenty-five feet in front on said street, and extending back therefrom the same width one hundred and twenty feet, with the three-story brick store and warehouse covering the same.

21st. A tract of land in the city of New Albany, a part of the N. W. quarter of fractional section No. 10 in T. 3 S., R. 6 E., marked letter "C" on plat No. 15 and on the city map, containing seventeen acres.

22nd. All the lots Nos. seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four, on Poplar street, in plat 20 in the city of New Albany.

23. All the lots Nos. thirty, thirty-one, thirty-two, thirty three, thirty-four, thirty-five, thirty-six, and thirty-seven, on Elm street, in plat No. 20 of the city of New Albany.

24. All of lots Nos. twenty-five, twenty-six, twenty-seven, twenty-eight, and twenty-nine, on Shipping street, in plat No. 20 of the city of New Albany.

25th. All those parts of lots, with appurtenances, being twenty-six feet in front off the eastwardly side of lot number thirty-nine, on Lower High street, in the city of New Albany, and thirteen feet in front off the westwardly side of lot number thirty-seven on the same street, both parts of said lots making thirty-nine feet in front on said Lower
52 High street, and extending back the same width ninety feet, having thereon two brick dwelling-houses.

26. A tract of land in the city of New Albany, being the north half of that part of the northwest quarter of section thirty-four, in town. 2 S., of R. 6 E., lying west of the Vincennes plank-road, except $1\frac{33}{100}$, deeded to George Lyman, containing eighty acres, more or less.

27. A tract of land in the city of New Albany, being all that part of letter "H" in No. 42 of the Illinois grant, which, beginning at a stake at the east side of Vincennes street, on plat No. 63, 450 feet north from the north line of Beeler street, runs thence north 40° W. 480 feet to the line of what is called Beach farm, (letter "C;") thence N. 50° E. 1,419 feet to a small beech tree in the southeastern corner of said Beach farm; thence S. 40° E. 480 feet to a stake; thence S. 50° W. 1,419 feet to the place of beginning, containing $15\frac{63}{100}$ acres.

28th. The undivided one-third part of that out-lot in the city of New Albany, known as lot No. 15, in the northwest quarter of section No. 34, town. 2 S., R. 6 E., containing $19\frac{56}{100}$ acres.

29. The north half of lot No. twenty-seven on Upper First street, in the city of New Albany, being twenty-five feet in front on said street, and extending back from said street the same width one hundred and twenty feet.

30th. The north half of lot number two on State street, in the city of New Albany, being twenty-five feet in front on said street, and extending back same width one hundred and twenty feet.

31st. All those lots in the city of New Albany, comprised in all of lot No. 1, in Clark and Elderkin's plat of a part of letter "E," in No. 28 in Illinois grant; that part of letter "D" in Lindsley and Day's east plat, and that part of lot letter "K," and others in Day's plat of Providence; and part of letter "D" in No. 28 Illinois grant, which is thus described: Beginning on the north line of the New Albany and Jeffersonville plank-road at the west line of the Chambers tract, and running thence westwardly on the line of said plank-road sixteen feet, more or less, to the eastern produced line of East street, in Lindsley and Day's east plat, when said street shall be opened sixty feet wide; thence running N. 40° W. with said produced line of East street, 60 feet wide, 559 feet, more or less; thence N. 50° E. 16 feet, more or less, to the northwestern corner of lot No. 1; thence S. 40° E. with the line of the Chambers tract 563 feet, more or less, to the place of begin'ing. Also, all the rights and interests held by the granters in and to the 30 feet of ground by 559 feet in length adjoining the land above described, which is to form the half of said East street.

It is further ordered that the said William S. Pearson, jr., and Harvey Seymour be allowed the sum of five hundred dollars each for their services as such trustees, to be taxed as cash herein.

And it is further ordered that the proceeds of the sale of said mortgaged property, and any part thereof, as the same shall be received, shall be applied, first, to the payment of all costs herein and the expences of the sale of said premises; and, secondly, to the payment of all the aforesaid claims of the several parties hereto pro rata.

It is further ordered by the court, with consent of all the parties hereto, that the sheriff of Floyd County, now Charles Frederick, esqr.,

be, and he is hereby, appointed a commissioner of this court to sell and convey said mortgaged premises in the manner and upon the terms following, to wit: Such sale shall be made at public auction, as lands
53 are sold on execution; but, before any such sale is made, said commissioner shall give not less than sixty days' notice of the time, place, and terms of sale, including a description of the property to be sold, by publication in two daily and weekly newspapers of general circulation printed in said Floyd County, and by posting up printed handbills in at least ten public places in the said county; and said mortgaged premises shall be sold in parcels; and any of said property shall not be town lots. The said parcels may consist of such subdivisions of the tracts described in the mortgage as may be advantageously made.

One-fourth of the purchase-money shall be paid cash at the time of sale, and the other three-fourths in two equal payments in one and two years, respectively, from the date of such sale, with interest from date, which shall be evidenced by notes, waiving the benefit of all valuation or appraisement laws, secured by a mortgage on the premises sold, said notes and mortgages being executed to said commissioner in trust for the use of the several parties hereto entitled to the proceeds thereof. Upon the receipt of such payment, such notes, and mortgage, said commissioner shall *shall* execute to the said purchasers, respectively, a proper deed of conveyance of all the rights, interests, an' title of said railroad company in and to said property. And said commissioner, upon the receipt of any such notes, money, and mortgages, shall immediately pay and deliver the same to the clerk of this court, taking his receipt therefor; and all money so received by said clerk shall be by him, from time to time, applied and paid out as hereinbefore declared.

It shall be the duty of said commissioner, upon the request of any one or more of the parties hereto entitled to payment from the proceeds of said mortgaged premises, or their attorneys, to proceed to advertise and sell said mortgaged premises as hereinbefore described, and he may adjourn and continue such sale from day to day until the whole be sold; and if any of said property cannot be sold at such sale for want of bidders, he may adjourn to any future time not exceeding six months, giving notice by publication, as aforesaid, and may, for the same cause, again adjourn the sale from time to time until the whole be sold. Said commissioner shall report his proceedings in the premises to the court at its next term. This cause is continued.

And afterwards, to wit, at the April term of said Floyd circuit court, on the 24th day of May, 1858:

Comes now Charles Frederick, heretofore appointed a commissioner to sell the mortgaged premises described in the order an' decree of the court herein at the last term, and in open court returns his report, under oath, of his proceedings in the premises, as such commissioner, in words and figures as follows, to wit:

To the honorable the Floyd circuit court:

The undersigned, appointed by this honorable court a commissioner in the above-entitled action to sell the real estate hereinafter described under the order of said court, would respectfully submit the following report of his proceedings in the premises:

After advertising the time and place of sale in the manner prescribed by the order of this honorable court, the undersigned, commissioner as aforesaid, on the thirteenth day of March, A. D. 1858, between the

hours of ten o'clock a. m, and four o'clock p. m. of said day, at the door of the court-house of Floyd County, Indiana, after first offering the rents and profits of the several lots and parcels of land hereinafter de-
54 scribed for a term of years not exceeding seven, and receiving no bid therefor, then and there separately offer and sell at public auction each of said lots or parcels of land in fee simple to the persons hereinafter named, in the manner and for the prices following, to wit: All that part of lots Nos. one and two on Lower Water street in the city of New Albany, beginning forty-five feet west from State street, extending thence westwardly on said Water street twenty-five feet, and back therefrom one hundred and eight feet the same width to a twelve-foot alley, with the right in common with other owners of parts of said lots one and two to the use of said alley for the sum of five hundred and twenty-five dollars. Lot No. forty-three, in Day's Mount Isham plat of a part of the city of New Albany, for the sum of eighty-five dollars; lots Nos. forty-four, forty-five, forty-six, forty-seven, forty-eight, and forty-nine in the same plat, each for the sum of one hundred dollars; and lot No. fifty in the same plat, for the sum of one hundred and thirty dollars—all of said lots fronting on Upper First street in said city. Lot No. sixty-six in Day's Mount Isham plat, for seventy-five dollars; lot No. sixty-seven in the same plat, for one hundred and seven $\frac{50}{100}$ dollars; and lot No. sixty-eight in the same plat for one hundred and thirty-five dollars—all of said lots fronting on Upper Second street, in the said city of New Albany. Lot No. sixty-one in Day's Mount Isham plat, for sixty-five dollars; lot No. sixty-two in the same, for sixty-five dollars; lot No. sixty-three in the same plat, for one hundred and ten dollars; lot No. sixty-four in the same plat, for one hundred and ten dollars; lot No. sixty-five in the same plat, for one hundred and thirty-five dollars; lot No. sixty-nine in the same plat, for eighty-five dollars; lot No. seventy in the same plat, for sixty-five dollars; and lot No. seventy-one in the same plat, for sixty-five dollars—all said lots fronting on the old Vincennes road, in the city of New Albany. Lot No. forty-one, on Ferry street, in Noyes and Cline's plat, for forty dollars; lot No. forty-two on said street, in said plat, for thirty-five dollars; lot No. forty-three on said street, in said plat, for thirty-five dollars; lot No. forty-four on said street, in said plat, for thirty-five dollars; lot No. forty-five on said street, in said plat, for forty-three dollars. The south half of lot No. twenty-six in Day's Reineking plat, being thirty feet in front by one hundred and twenty feet deep on the west side of Lower Fifth street, in the city of New Albany, with the appurtenances, for four hundred and sixty dollars. Lot No. 1 on Upper First street, in the city of New Albany, for eight hundred dollars; lot No. three on Upper First street, for eight hundred and five dollars; and lot No. five on said street, for nine hundred and seventy-five dollars. The undivided half of lot No. twenty-eight on Upper Fourth street, in in the city of New Albany for one hundred dollars. Lots Nos. two and three on Beach street, in block "C" of plat No. twenty, in the city of New Albany, each for the sum of fifty-five dollars. A tract of land bounded by a line beginning at a stake in the southeast corner of lot No. three on the map of the city of New Albany, at the east corner of the land of Samuel Wilcox, deceased, and running thence north 42° west seventy-two and two-thirds poles to a stake; thence south 49° west forty-six poles to a stake; thence south 42° east seventy two poles to a stone; thence north 40° east forty-six poles to the place of beginning, being in the vicinity of New Albany, and containing twenty acres and one hundred and forty-two perches, for one thousand and forty-four $\frac{38}{100}$ dollars. Lot No. fifty-three on Spring street in Conner's plat, in the city of New Al-

bany, for two hundred and sixty-five dollars; lot No. fifty-five in said
55 plat, on said street, for two hundred and seventy-five dollars, and the west half of lot No. fifty-seven on said street, in said plat, for one hundred and fifty dollars. All that tract of land in the city of New Albany known as lot No. twenty-seven, of survey No. twenty-nine in the Illinois grant, containing eleven $\frac{91}{100}$, being all that part of the Edwards plat of 18 acres which lies southward of the plank-road to Jeffersonville, for five hundred and ninety-five $\frac{50}{100}$ dollars. Lot No. one on Scott street, in Moore's plat of a part of the city of New Albany, for thirty-five dollars; lot No. two in said plat, and on said street, for forty-one dollars; and lots Nos. three and four on said street, *in said street*, each for the sum of forty-three dollars. Lot No. ten on Jackson street, in Moore's plat of a part of the city of New Albany, for thirty-six dollars; lot No. eleven on said street, in said plat, for forty-five $\frac{50}{100}$ dollars; lot No. twelve on said street, in said plat, for fifty $\frac{50}{100}$ dollars; lot No. thirteen on said street, in said plat, for fifty dollars; lot No. fourteen on said street, in said plat, for forty-six dollars; lot No. fifteen on said street, and in said plat, for forty-five dollars; lot No. sixteen in said plat, on said street, for forty-nine dollars; lot No. seventeen on said street, in said plat, for fifty $\frac{50}{100}$ dollars; lot No. eighteen on said street, in said plat, for fifty dollars. All that block or square numbered seven, in the plat of the subdivision of the White Hill tract, in the city of New Albany, and also that part of the Ohio River bank which lies immediately in front of said block or square, between the lines produced by the extension of Upper Fifteenth street and Sixteenth street, and extending from the south line of Water street to low-water mark, for the sum of thirteen hundred dollars. A part of lot No. two on Lower Water street, in the city of New Albany, beginning at a point on said Water street twenty-five feet east from the southwest corner of said lot, extending thence eastward on said street twenty-five feet, and running back from said street the same width one hundred and eight feet to a twelve-foot alley, with the right of the use of said alley in common with other owners of adjoining lots, for the sum of three hundred and five dollars. The north half of lot No. eight on State street, in the city of New Albany, being twenty-five feet in front on said street, extending back therefrom the same width one hundred and twenty feet, with the three-story brick store and warehouse covering the same, for the sum of three thousand five hundred dollars. A tract of land in the city of New Albany, part of the northwest quarter of fractional section No. ten in three south, of range six east, marked letter "C" on plat No. fifteen and on the city map, containing seventeen acres, for the sum of one thousand six hundred and sixty-six dollars. Lot No. twenty-three on Poplar street, in plat No. twenty, of the city of New Albany, for twenty-five dollars; lot No. twenty-four on said street, in said plat, for twenty-two dollars; lot No. thirty on Elm street, in plat No. twenty, of the city of New Albany, for twenty-three dollars; lot No. thirty-one on said street, in said plat, for twenty-seven $\frac{50}{100}$ dollars; lots Nos. thirty-two, thirty-three, thirty-four, thirty-five, and thirty-six on said street, in said plat, for the sum of twenty-seven dollars each; and lot No. thirty-seven on said street, in said plat, for the sum of thirty dollars. Lot No. twenty-five on Shipping street, in plat No. twenty of the city of New Albany, for the sum of twenty-one dollars; and lot No. twenty-six in the same plat, on the same street, for twenty-six dollars. All those parts of lots, with the appurtenances, being twenty-six feet in front off the eastwardly side of lot No. thirty-nine on Lower High street, in the city of New Albany, and thirteen feet off the westwardly side of lot No. thirty-seven on the

56 same street, both parts of lots making thirty-nine feet in front on said Lower High street, extending back the same width ninety feet, having thereon two brick dwelling-houses, for the sum of one thousand and ninety dollars. A tract of land in the city of New Albany, being the north half of that part of the northwest quarter of section thirty-four, in town two south, of range six east, lying west of the Vincennes plank-road, (except one $\frac{33}{100}$ acres deeded to George Lyman,) containing eighty acres, more or less, for the sum of eight thousand dollars. A tract of land in the city of New Albany, being all that part of letter "H" in No. forty-two of the Illinois grant, which, beginning at a stake on the east side of Vincennes street, in plat No. sixty-three, four hundred and fifty feet north from the north line of Beeler street; runs thence north 40° west 480 feet to the line of what is called Beach farm, (letter "C;") thence north 50° east 1,419 feet to a small beach tree in the southeastern corner of said Beach farm; thence south 40° east 480 feet to a stake; thence south 50° W. 1,419 feet to the place of beginning, containing fifteen $\frac{63}{100}$ acres, for the sum of three thousand five hundred and ninety-four $\frac{90}{100}$ dollars. The undivided one-third part of that out-lot in the city of New Albany known as lot No. fifteen, in the northwest quarter of section No. thirty-four, in town two S., range six east, containing nineteen $\frac{56}{100}$ acres, for the sum of nine hundred and twelve $\frac{80}{100}$ dollars. The north half of lot No. twenty-seven on Upper First street, in the city of New Albany, being twenty-five feet in front on said street, and extending back same width one hundred and twenty feet, for five hundred dollars. The north half of lot No. two on State street, in the city of New Albany, being twenty-five feet in front on said street, and extending back therefrom same width one hundred and twenty feet, for the sum of six hundred dollars. And all those lots in the city of New Albany comprised in all of lot No. one in Clark and Elderkin's plat, of part of letter "E" in No. 28 of the Illinois grant, that part of letter "D" in Lindsley and Day's east plat, and that part of lot letter "H" and others in Day's plat of Providence, and that part of letter "D" in No. 28, Illinois grant, which are thus described: Beginning on the north line of the New Albany and Jeffersonville plank-road, at the west line of the Chambers tract, and running thence westward on the line of the said plank-road sixteen feet, more or less, to the eastern produced line of East street in Lindsley and Day's east plat, when said shall be opened, sixty feet wide; thence running north 50° west with said produced line of East street sixty feet wide, five hundred and fifty-nine feet, more or less; thence north 50° east sixteen feet, more or less, to the northwest corner of said lot No. one; thence south 40° east with the line of the Chambers tract five hundred and sixty-three feet, more or less, to the place of beginning; and also all the rights and interests held by the New Albany and Sandusky City Junction Railroad Company in and to thirty feet of ground by five hundred and fifty-nine feet in length, adjoining the land last above described, which is to form the half of said East street, for the sum of one thousand two hundred and thirty dollars. All of the several lots or parcels of land above described were sold as aforesaid, for the several sums aforesaid, to Michael C. Kerr and Victor A. Pepin, trustees, to hold said premises, according to the terms of conveyance made to them by the undersigned, in trust for John Phelps Putnam, Sarah Coit Day, Samuel J. Andrews, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Charles Arther Ely, Herman Ely, A. H. Mass, Thomas L. Smith, Samuel H. Patterson, John S.
Davis, William M. Wier, William B. Lent, Victor A. Pepin,
57 Charles B. Applegate, James Montgomery, and Walter Mann;

the said several sums bid as aforesaid being the highest and best bids made for each of said lots or parcels of land respectively.

The undersigned, also, sold as aforesaid, at the time and place aforesaid, the west half of the southeast quarter of section No. six, town. three south, of range six east, in the county of Floyd, State of Indiana, to Peter Vernia, for the sum of three hundred and sixty-eight dollars, that being the highest and best bid therefor. Also, the undersigned sold as aforesaid, at the time and place aforesaid, a tract of land beginning at a stake in the east corner of the land of Samuel Wilcox, deceased, at the southeast corner of lot No. three on the map of the city of New Albany, and bounded by a line running thence south 49° west one hundred and eighty-nine feet; thence north 41½° west three hundred and seventy three $\frac{56}{100}$ feet to the center of the Silver Creek road; thence along said road southwardly two hundred and six $\frac{58}{100}$ feet; thence south 41½° *degrees* east two hundred and ninety-seven feet to the place of beginning, containing one and a half acres, to John M. Leib, for the sum of ninety-one dollars, that being the highest and best bid therefor. Also, the undersigned sold as aforesaid, at the time and place aforesaid, a tract of land in Floyd County, Ind'a, near the city of New Albany, known as a part of the east half of the southeast quarter of section thirty-three, in town. two south, of range six east, bounded by a line beginning on the Boiling Spring road on the line between Gaudy and Thomas Sinex, running thence with said line to the line of John P. Frank's land; thence westwardly along said line to the line of William Drysdale's land; thence southwardly along said line till it strikes the line of land heretofore conveyed by Gaudy to Wright; thence eastwardly along said eastern line to the line of the Boiling Spring road; thence along said road ten feet to the place of beginning, containing thirty acres, more or less, to David H. Cadwalader, for the sum of five hundred and forty dollars, that being the highest and best bid made therefor. Also, the undersigned sold as aforesaid, at the time and place aforesaid, lot No. twenty-one on Poplar street, in plat No. twenty, for fifty dollars; lot No. twenty-two on the same street, in the same plat, for twenty-six $\frac{50}{100}$ dollars, to William B. Swift, he being the highest and best bidder therefor, each lot respectively. Also, the undersigned sold as aforesaid, at the same time and place as aforesaid, to Samuel J. Kelley, lot No. seventeen on Poplar street, in plat No. twenty of the city of New Albany, for fifty-seven dollars; lot No. eighteen on the same street, in the same plat, for fifty-one dollars; lot No. nineteen on the same street, in the same plat, for fifty dollars; lot No. twenty on the same street, in the same plat, for fifty-one dollars—the said several sums being the highest and best bids made for each of the said lots respectively. Also, the undersigned sold as aforesaid, at the time and place aforesaid, lot No. seven, in Shipping street, in plat No. twenty, in the city of New Albany, to George H. Graves, for the sum of thirty dollars; and also lot No. twenty-eight on the same street, in the same plat, for twenty-four $\frac{50}{100}$ dollars—the said several sums being the highest and best bids offered for each of said lots respectively. Also, the undersigned sold as aforesaid, at the time and place aforesaid, lot No. twenty-nine on Shipping street, in plat No. twenty of the city of New Albany, to James Lucas, for thirty-one $\frac{50}{100}$ dollars, that being the highest and best bid made therefor.

All the purchasers at said sale, except the said Michael C. Kerr and Victor A. Pepin, have complied in all respects with the terms of the order of this honorable court under which said sale was made;
58 and the undersigned, as commissioner of this court, has made to

each of said purchasers a deed of conveyance of the premises by him purchased as aforesaid. Said deeds and moneys, notes and mortgages, received from said purchasers, are herewith returned to this honorable court for examination and approval.

The said Michael C. Kerr and Victor A. Pepin bid in the several lots and parcels of land by them purchased as aforesaid, as trustees in trust as aforesaid, for all and each of the persons who are beneficially interested in the judgment and decree of this honorable court, under which judgment and decree this sale was made as aforesaid. The said sales, made as aforesaid to the said Kerr and Pepin as aforesaid, amount in the aggregate to the sum of thirty one thousand seven hundred and eight $\frac{08}{100}$ dollars.

And the said persons so beneficially interested in said judgment and decree, having agreed to take the real estate purchased by the said Kerr and Pepin at the prices aforesaid, as so much cash upon said judgment and decree, I have not taken from the said Kerr and Pepin any note or mortgage on account of said purchase. I have executed to the said Kerr and Pepin, as such trustees aforesaid, a deed for the several lots and parcels of land by them purchased as aforesaid.

I herewith report all the costs and charges incident to and growing out of said sale:

Charles Frederick, commissions	$250 00
Same for advertising, drafting deeds, notes, mortgages, &c...	$60 00
Norman, Harrison & Matthews, printers	$168 50
M. Gregg & Sons, printer's fees	$148 50
	$627 00

CHARLES FREDERICK,
Commissioner.

Subscribed and sworn to before me May 15th, 1858.
S. P. TOWN, *Clerk.*

And the court, being fully advised in the premises, does now in all things fully approve and confirm said report.

It is further ordered by the court that said commissioner be allowed the sum of two hundred and fifty dollars as commissions for his services herein, and the further sum of sixty dollars for advertising, drafting deeds, notes, mortgages, &c.; and that Norman, Harrison & Mathews be allowed the sum of one hundred and sixty-eight dollars and fifty cents for printing, &c., and M. Gregg and Sons the sum of one hundred and forty-eight dollars and fifty cents for printing, &c., herein; all said allowances to be taxed and paid as costs herein.

It appearing to the court that the entire proceeds of the sale of said mortgaged premises, after deducting all costs, are wholly insufficient to pay the several judgments herein, and that there still remains a proportionate part of each of the judgments rendered herein at the last term of this court, amounting in the aggregate to the sum of eighty-five thousand three hundred and nineteen dollars, (85,319,) each of said several judgment plaintiffs herein being entitled to recover of said deficiency an amount proportionate to the relative amount of his separate judgment, it is now, therefore, further ordered by the court that the said judgment plaintiffs have further execution herein against the
59 said railroad company, to make said deficiency by levy and sale

of any other property of said company subject to execution, to be executed without relief from valuation or appraisement laws.

And, afterwards, to wit, at the said April term of the said Floyd circuit court, on the 25th day of May, 1858—

Come now Thomas L. Smith, John Phelps Putnam, Sarah Coit Day, Samuel J. Andrews, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Charles Arthur Ely, Herman Ely, and A. H. Moss, by Smith and Kerr, their attorneys, and in open court file their several bonds on which judgment and foreclosure have been heretofore had herein, numbered as follows, to wit, Nos. 14, 15, 16, 17, 18, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 50, 51, 52, 53, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, being each for the sum of $1,000, making in all 58 bonds, with coupons thereto attached. It is now therefore ordered by the court that the clerk of this court file said several bonds and preserve the same in his office safely.

The bonds mentioned in the foregoing order read in the words and figures following, to wit:

No. 14. *United States of America, State of Indiana.* $1,000

One thousand dollars. The New Albany and Sandusky City Junction Railroad Company acknoweledges that it owes upon the sale of this bond one thousand dollars, which sum said company promises to pay to John P. Yelverton or bearer, at the People's Bank, in the city of New York, on the first day of January, one thousand eight hundred and sixty-five, and all interest thereon at the rate of seven per centum per annum, semi-annually on the first days of July and January in each year from the date thereof, on the presentation of the annexed interest-warrants at the said bank until the said principal sum shall be paid.

And said company also agrees that the holder of this bond shall have the privilege of converting it into twenty shares of fifty dollars each of the capital-stock of said company, upon delivering it with the unpaid coupons to the secretary at the office of said company, in exchange for such stock, at any time within five years of the date hereof. And said company also agrees that all rights and benefits arising hereupon may be transfer'ed by general or special endorsement, or by delivery, as if the same was a note of hand payable to bearer, and hereby waives all benefit from valuation or appraisement laws.

In testimony whereof the said company has *has* caused its corporate seal to be hereto attached, and these presents to be subscribed to by its president and countersigned by its secretary this twentieth day of September, one thousand eight hundred and fifty-four.

[SEAL.] J. MONTGOMERY, *Pres.*

Countersigned:

THO'S L. SMITH, *Secretary.*

The undersigned trustees hereby certify that the New Albany and Sandusky City Junction Railroad Company has conveyed to us, by deed bearing date the twentieth day of September, 1854, the real estate discribed in a schedule accompanying the same, in trust, for the use and benefit of the holders of the above bond, and one hundred and
60 nine others of similar tenor, effect, and amount, with power to sell said lands on default of payment of said bonds or interest-

warrants, or either of them, and pay the same out of the proceeds of said real estate, which is situated in the State of Indiana, was taken by said company for stock, and has been appraised to be of the value of one hundred and fifty-four thousand eight hundred & fifty-five dollars, as by reference to said deed of trust, which has been duly recorded in the counties where said lands are situated, [as] will more fully and at large appear.

Dated at New York, September 30th, 1854.

WILLIAM G. PEARSON, JR.,
HARVEY SEYMOUR, *Trustees.*

$35. *Interest warrant.* No. 20.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first day of January, 1865, thirty-five dollars, interest due on real-estate bond No. 14.

THO'S L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 19.

The New Albany & Sandusky Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first day of July, 1864, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 18.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first day of January, 1864, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 17.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first day of July, 1863, the sum of thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 16.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in New York City, on the first day of January, 1863, tbirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 15.

The New Albany and Sandusky City Junction Railroad Com-
61 pany will pay the bearer, at the People's Bank in the city of New York, on the first day of July, 1862, thirty-five dollars, interest due on real-estate bond No. 14.

THO'S L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 14.

The New Albany and Sandusky City Junction Railroad Co. will pay the bearer, at the People's Bank in New York City, on the first day of January, 1862, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 13.

The New Albany and Sandusky City Junction Railroad Company will pay to the bearer, at the People's Bank in New York City, on the first day of July, 1861, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 12.

The New Albany and Sandusky City Junction Railroad Co. will pay to the bearer, at the People's Bank in New York City, on the first day of January, 1861, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 11.

The New Albany & Sandusky City Junction Railroad Company will pay to the bearer, at the People's Bank in New York City, on the first day of July, 1860, thirty-five dollars, interest due on real-estate bond No. 14.

THO'S L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 10.

The New Albany and Sandusky City Junction Railroad Company will pay to the bearer, at the People's Bank in the city of New York, on the first day of January, 1860, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 9.

The New Albany and Sandusky City Junction Railroad Co. will pay the bearer, at the People's Bank in New York City, on the first day of July, 1859, the sum of thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 8.

The New Albany and Sandusky Junction Railroad Company
62 will pay the bearer, at the People's Bank in New York City, on the first day of January, 1859, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 7.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first day of July, 1858, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 6.

The New Albany & Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first of January, 1858, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 5.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first day of July, 1857, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

(The balance of the coupons belonging to this bond were not filed therewith.)

The other bonds mentioned in the said order are similar to the above bond, excepting the numbers.

And afterward, to wit, on the 6th day of August, 1858, an alias execution is issued herein in the words and figures following, to wit:

STATE OF INDIANA, *Floyd County, sct:*

I, William W. Tuley, clerk of the Floyd circuit court, hereby certify the foregoing to be a full, true, complete transcript of all proper entries made by the clerk, and all papers pertaining to the above-entitled action and on file therein as the same appear on record and on file in our office.

Witness my hand and seal of said court, affixed at New Albany this 15th day of January, A. D. 1869.

W. W. TULEY, *Clerk.*

An ordinance authorizing the subscription of stock and the issue of bonds in and to the New Albany and Sandusky City Junction Railroad Company.

(Passed November 18, 1853.)

Section 1. Preamble, and orders subscription for $400,000 to be paid for in bonds, &c.

2. Mayor to issue bonds attested by clerk.

3. Council shall levy tax for interest and sinking fund.

4. Tax entered in separate column and certificate issued therefor.

63 5. Stock to be transferred to holder of certificate.

6. Agreement to be first made: 1. That such transfers by city shall be recognized by company. 2. The company to pay in stock the

interest paid by city for first three years. 3. So soon as company accept, agreement to be binding.

7. In force from and after its passage.

Preamble. Whereas three-fourths of the legal voters of the city of New Albany have petitioned the common council of said city to subscribe for stock to the amount not exceeding six hundred thousand dollars in the New Albany and Sandusky City Junction Railroad Company, or in the Fort Wayne and Southern Railroad Company, incorporated to construct a railroad from New Albany to the State line of Ohio, making such subscription to the one or other of said companies in such manner or proportions as shall be deemed most for the interest of said city, and to provide for the payment of the debt thus contracted in the manner provided by law: Therefore,

Subscription of $400,000 ordered payable in city bonds. SECTION 1. *It is ordained by the common council of the city of New Albany*, That Joseph A. Moffett, the mayor of said city, be authorized and directed to subscribe in the name and behalf of said city eight thousand (8,000) shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company, amounting to the sum of four hundred dollars, to be paid for in the bonds of said city of not less than one hundred dollars each, upon the call of said company, said bonds being payable in not less than ten nor more than twenty years after their respective dates, and bearing interest at the rate of six per centum per annum, and both principal and interest payable in the city of New York.

Bonds issued. SECTION 2. The mayor of said city of New Albany shall issue said bonds, with coupons for the interest, payable as aforesaid upon the call of said company, and deliver the same on the reception of the same amount of certificates of stock of said company as they may from time to time receive the city bonds; and the said mayor is hereby authorized to sign the corporate name of said city to the bonds so issued by him, and attach thereto the seal of said city, which shall be attested by the city clerk, and for the payment of the interest and the final redemption of said bonds the faith of said city is hereby pledged.

Levy of tax. SECTION 3. The common council shall, from year to year, levy a tax sufficient to pay the annual interest on the debt hereby created, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof.

Issue of certificates. SECTION 4. In preparing the tax duplicate for each year, the city clerk shall place the taxes levied under the last preceding section in a separate column, to be styled "tax for railroad purposes," and for all payments of such taxes the city treasurer shall issue to the person paying the same a certificate, showing the amount of tax thus paid by such person, which certificate shall be assignable by endorsement.

Stock transfer'ed for certificates. SECTION 5. Whenever an amount of such certificates, equal to one share of the capital stock of said company, or more, at its par value, shall be presented to the mayor of said city, he shall transfer to the holder of such certificates such number of shares of such stock owned by said city as said certificates may amount to, and, if there should be a fraction over the proper amount, the said mayor shall issue to the holder a certificate for such fraction, which certificate shall be assignable in the same manner, and entitle the holder to the same rights, as the certificates issued by the city treasurer.

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$35. *Interest warrant.* No. 7.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first day of July, 1858, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 6.

The New Albany & Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first of January, 1858, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

$35. *Interest warrant.* No. 5.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank in the city of New York, on the first day of July, 1857, thirty-five dollars, interest due on real-estate bond No. 14.

THOMAS L. SMITH, *Secretary.*

(The balance of the coupons belonging to this bond were not filed therewith.)

The other bonds mentioned in the said order are similar to the above bond, excepting the numbers.

And afterward, to wit, on the 6th day of August, 1858, an alias execution is issued herein in the words and figures following, to wit:

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(Passed November 18, 1853.)

Section 1. Preamble, and orders subscription for $400,000 to be paid for in bonds, &c.

2. Mayor to issue bonds attested by clerk.

3. Council shall levy tax for interest and sinking fund.

4. Tax entered in separate column and certificate issued therefor.

63 5. Stock to be transferred to holder of certificate.

6. Agreement to be first made: 1. That such transfers by city shall be recognized by company. 2. The company to pay in stock the

interest paid by city for first three years. 3. So soon as company accept, agreement to be binding.

7. In force from and after its passage.

Preamble. Whereas three-fourths of the legal voters of the city of New Albany have petitioned the common council of said city to subscribe for stock to the amount not exceeding six hundred thousand dollars in the New Albany and Sandusky City Junction Railroad Company, or in the Fort Wayne and Southern Railroad Company, incorporated to construct a railroad from New Albany to the State line of Ohio, making such subscription to the one or other of said companies in such manner or proportions as shall be deemed most for the interest of said city, and to provide for the payment of the debt thus contracted in the manner provided by law: Therefore,

Subscription of $400,000 ordered payable in city bonds. SECTION 1. *It is ordained by the common council of the city of New Albany*, That Joseph A. Moffett, the mayor of said city, be authorized and directed to subscribe in the name and behalf of said city eight thousand (8,000) shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company, amounting to the sum of four hundred dollars, to be paid for in the bonds of said city of not less than one hundred dollars each, upon the call of said company, said bonds being payable in not less than ten nor more than twenty years after their respective dates, and bearing interest at the rate of six per centum per annum, and both principal and interest payable in the city of New York.

Bonds issued. SECTION 2. The mayor of said city of New Albany shall issue said bonds, with coupons for the interest, payable as aforesaid upon the call of said company, and deliver the same on the reception of the same amount of certificates of stock of said company as they may from time to time receive the city bonds; and the said mayor is hereby authorized to sign the corporate name of said city to the bonds so issued by him, and attach thereto the seal of said city, which shall be attested by the city clerk, and for the payment of the interest and the final redemption of said bonds the faith of said city is hereby pledged.

Levy of tax. SECTION 3. The common council shall, from year to year, levy a tax sufficient to pay the annual interest on the debt hereby created, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof.

Issue of certificates. SECTION 4. In preparing the tax duplicate for each year, the city clerk shall place the taxes levied under the last preceding section in a separate column, to be styled "tax for railroad purposes," and for all payments of such taxes the city treasurer shall issue to the person paying the same a certificate, showing the amount of tax thus paid by such person, which certificate shall be assignable by endorsement.

Stock transfer'ed for certificates. SECTION 5. Whenever an amount of such certificates, equal to one share of the capital stock of said company, or more, at its par value, shall be presented to the mayor of said city, he shall transfer to the holder of such certificates such number of shares of such stock owned by said city as said certificates may amount to, and, if there should be a fraction over the proper amount, the said mayor shall issue to the holder a certificate for such fraction, which certificate shall be assignable in the same manner, and entitle the holder to the same rights, as the certificates issued by the city treasurer.

Agreement between company and city.

SECTION 6. Before the subscription of said stock and the delivery of said bonds, the following agreement, irrevocable, except by the consent of both parties thereto, shall be entered into by the city of New Albany, and the New Albany and Sandusky City Junction Railroad Company:

1. That all shares of stock transferred by said city in accordance with the provisions of the fourth and fifth sections of this ordinance shall be held and recognized by said railroad company as good and valid stock fully paid for.

2. The New Albany and Sandusky City Junction Railroad Company shall pay to the city of New Albany, in stock of said company, an amount thereof equal, at its par value, to the amount of interest on the bonds of said city, issued under the provisions of this ordinance for the first three years after the date thereof, deducting therefrom any dividends that may be paid by the said railroad company to said city. The stock thus paid by said railroad company to be issued at such times as the said interest may become due.

3. So soon as the board of directors of said New Albany and Sandusky City Junction Railroad Company shall accept of the foregoing agreement, and pass a by-law, irrevocable, to sustain the same, it shall be a contract to all intents and purposes, to be rescinded only in whole or in part by the consent of the contracting parties.

SEC. 7. This ordinance is to be in force from and after its passage.

Subscription of stock to the New Albany and Sandusky City Junction Railroad Company.

(Copy.)

Preamble.

Whereas an ordinance was passed by the mayor and common council of the city of New Albany on the 18th of November, 1853, by the 1st section of which the mayor of said city was authorized to subscribe in the name and on the behalf of said city for eight thousand shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company, amounting to four hundred thousand dollars, to be paid for, in the bonds of said city of not less than one hundred dollars each, upon the call of said company:

Subscription of stock.

Now, therefore, I, Joseph A. Moffett, mayor of said city, do hereby, by virtue of the authority given me as aforesaid, subscribe for 8,000 shares of the stock of said railroad company in the name and on behalf of said city of New Albany, to be paid for as above provided by said ordinance.

In testimony whereof I have hereunto subscribed my name as mayor of said city, and caused the seal of said city to be hereto affixed by the clerk, this 19th of November, 1853.

J. A. MOFFETT, *Mayor.*

Attest: E. SABIN, *City Clerk.*

An act to allow ratification.

An act to enable cities which have subscribed for stocks in companies incorporated to construct works of public utility, under the 56th section of the general act for the incorporation of cities, and to ratify the same.

(Approved February 21st, 1855.)

65 Section 1 allows cities to ratify subscriptions for stock previously made.

Section 2, an emergency.

Certain acts declared valid.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, That the common council of any city which has contracted obligations or liabilities by subscribing for the stock of any company incorporated for the construction of any railroad or other work of public utility to such city, upon the written petition of three-fourths of the legal voters thereof, under the provisions of the 56th section of the general act for the incorporation of cities, upon the supposition it was authorized to do so by said section, may, at any time after the passage of this act, ratify and affirm such subscription; and upon such ratification such subscription, and the obligations and liabilities, and the corporate bonds or obligations issued or to be issued therefor by such city, shall be valid.

Emergency.

SECTION 2. That inasmuch as contracts have been entered into by cities which it is desirable should be ratified or disaffirmed without delay, it is declared that an emergency exists in this case, and this act shall take effect from and after its passage.

Ratification.

An ordinance to ratify and affirm a subscription of eight thousand dollars to the capital stock of the New Albany and Sandusky City Junction Railroad Company by the city of New Albany, made on the 19th day of November, 1853, by the mayor of said city, pursuant to an ordinance of the common council thereof, passed on the 18th day of November, 1853, entitled "An ordinance authorizing the subscription of stock and the issue of bonds in and to the New Albany and Sandusky City Junction Railroad Company."

(Passed March 7, 1855.)

Section 1. Preamble and ratifies subscription.
Section 1. In force from passage.

Be it ordained by the common council of the city of New Albany:

Preamble.

SECTION 1. That whereas Joseph A. Moffett, mayor of said city, did, on the 19th day of November, 1853, in the name and on the behalf of said city, and pursuant to the provisions of an ordinance of the common council of said city, passed on the 18th day of November, 1853, subscribe for eight thousand shares of the capital stock of the New Albany and Sandusky City Junction Railroad Company; and whereas said ordinance was passed and said subscription made upon the written petition of more than three-fourths of the legal voters of said city, under the provisions of the fifty-sixth section of the general act for the incorporation of cities, contained in the revised statutes of this State, and upon the supposition that this common council was authorized by said section to pass said ordinance and cause said subscription to be made, the said road of said company being deemed a work of public utility to said city; and whereas an order has been passed by the board of directors of said company and communicated to this council, to the effect that if said subscription be now ratified and affirmed by virtue of the provisions of an act of the general assembly of this State, entitled "An act to enable cities which have subscribed for stock in companies incorporated to construct works of public utility, under the 56th section of the general act for the in-

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corporation of cities, to ratify the same," approved February 21st, 1855, the calls for the payment of the instal'ments on said stock shall not exceed $250,000 until the road shall have been completed and put in running order at least to its junction with the Ohio and Mississippi Railroad, and the remaining instal'ments shall only be called for

and used for the purpose of furnishing the road with rolling-stock, depots, and the necessary machinery and appliances for running said road, or said portion of it; and that said order shall be irrevocable if said subscription be ratified: Therefore,

Subscription ratified.

It is hereby ordained, That said subscription made by Joseph A. Moffett for eight thousand shares of the capital stock of said company, in the name and on the behalf of the city, be, and the same is hereby, now ratified and affirmed, and all the provisions of said ordinance, by virtue of which said subscription was made, shall remain in full force.

SEC. 2. This ordinance shall take effect and be in force from and after its passage.

This ordinance objected to as evidence by the defendants, for the reason that it is incompetent and irrelevant under the issue joined. Objection overruled by the court and exception taken by the defendants. And it is agreed that said exception shall be stated in the record without a bill of exceptions.

Here follows an execution issued out of the Floyd circuit court, with the return thereto:

The State of Indiana to the sheriff of Floyd County, greeting:

Whereas, on the 14 day of November, 1857, sundry persons recorded judgments in the Floyd County circuit court against the New Albany and Sandusky City Junction Railroad Company for sundry sums, in all amounting to one hundred and nineteen thousand eight hundred and seventy dollars, to wit, William S. Pearson, j'r, and Harvey Seymour, trustees, &c., $54,885; Victor A. Pepin, $18,295; Walter Mann and Samuel H. Patterson, each, $1,035; John S. Davis, Charles B. Applegate, each, $7,050; Thomas L. Smith, John S. McDonald, William M. Weir, and William B. Lent, each, $5,875, together with their costs in said action expended, and Charles Fredrick, esq., was appointed by said court a commissioner to sell certain real estate which, by the order of said court, was directed to be sold to satisfy said judgments, costs, &c.; and afterwards, to wit, at April term, 1858, of said court, said commissioner made report to said court that, after advertising and selling the real estate ordered by the court to be sold by him, *that* there still remains unpaid a proportionate part of each of the judgments *h*endered herein at the last term of this court, amounting in the aggregate to the sum of eighty-five thousand three hundred and nineteen dollars, ($85,319,) each of the said several judgment plaintiffs herein being entitled to recover of said deficiency an amount proportionate to the relative amount of his separate judgment: It is now, therefore, ordered by the court that the said judgment plaintiffs have further execution herein against said railroad company to make said deficiency by levy and sale of any other property of said company subject to execution, to be executed without any other relief from valuation or appraisement laws.

You are therefore commanded to levy said sum so reported deficient as aforesaid, with interest to this date, amounting to the sum of eighty-six thousand three hundred and fifty-seven $\frac{04}{100}$ dollars, of the property of the said New Albany and Sandusky City Junction Railroad
67 Company in your county, subject to execution, and have the money at the clerk's office, to satisfy said judgment, interest, and costs accrued, and return this writ in one hundred and eighty days, with your doings thereon.

Witness Salem P. Town, clerk of said court, and the seal thereof hereto affixed, this 6th day of August, 1858.

[L. S.] SALEM P. TOWN, *Clerk.*

By virtue of the within execution I have this day levied upon that part of lots Nos. 6 & 8 on Upper Elm street, in the city of New Albany, Indiana, beginning at the northeast corner of said lot No. 8 on Upper First street, and running thence southward on said street 40 feet, and extending back the same width 120 feet, subject to the rights of the lessees now on the ground, to hold the same unto her and her representatives and assigns forever, &c., taken as the property of said defendants this 9th day of October, 1858.

CHARLES FREDRICK, *S. F. C.*

And after advertising the time and place of sale in the manner prescribed by law, I did, by virtue of this execution, between the hours of 10 o'clock a. m. and 4 o'clock p. m., of the 3d day of November, 1858, at the court-house door of said Floyd County, after first offering, according to law, the rents and profits of the premises levied on as aforesaid for a term of years, not exceeding seven, and receiving no bid therefor, then and there offer and sell at public auction the said premises in fee-simple to John E. Noys and Michael Clynes, for the sum of fifteen dollars, that being the highest and best bid made therefor; and I have made said John E. Noys and Michael Clynes a deed for said premises, and I have applied said sum of fifteen dollars to the payment in part of the costs of sale and other costs herein. And this writ being still unsatisfied, I have made carefull search and diligent inquiry for other property of the within-named New Albany and Sandusky City Junction Railroad Company in Floyd County, and, finding none, I now return this execution unsatisfied, no property of the defendant being found in my county out of which the said sums of money, in said writ mentioned, or any part thereof, can be made.

December 1st, 1858.

CHARLES FREDRICK, *S. F. C.*

And here follows the endorsements on said execution:

File 7273, writ 4254. Returnable in 180 days. Victor A. Pepin vrs. N. A. and S. C. J. R. R. Co. et al. Judgment May 24, 1858. Repleviable. Atto and Davis, attorneys. Judgment, $85,319. Costs, $1,666 45. Interest from May 24, 1858. Without relief from valuation or appraisement laws. Came to hand August 11, 1858, at 10 o'clock a. m. C. Fredrick, S. F. C.

STATE OF INDIANA, *Floyd County, set:*

I, William W. Tuley, clerk of the Floyd circuit court, hereby certify the foregoing to be a full, true, and complete copy of the original writ, and return thereon, as the same appears of record and on file in our office, with all its endorsements.

Witness my hand and the seal of said court affixed at New Albany this 20th day of January, 1869.

[SEAL.] W. W. TULY, *Clerk.*

68 Here follow certain proceeding, extracted from the records of the common council of the city of New Albany:

STATE OF INDIANA,
Floyd County, City of New Albany, sct:

At a regular meeting of the common council of the city of New Albany, county of Floyd, and State of Indiana, at the council chamber, on Monday evening, March 5th, 1855, among others were the following proceedings:

Mr. Bradly, from the ordinance committee, reported "An ordinance to ratify and affirm a subscription of eight thousand shares to the capital stock of the New Albany and Sandusky Junction Railroad Company by the City of New Albany," made on the 19th day of November, 1853, by the mayor of said city, in pursuance of an ordinance of the common council thereof, passed on the 18th day of November, 1853, entitled "An ordinance authorizing the subscription of stock and the issue of bonds in and to the New Albany and Sandusky City Junction Railroad Company," and moved that the same be made the special order for the next Wednesday night.

Mr. Stoy moved to amend by making it the special order for the first regular meeting in April.

Mr. Bradly moved to lay Mr. Stoy's amendment on the table, which was carried; and the question then recurring on Mr. Bradley's original motion, it was carried, and the ordinance declared the special order for next Wednesday evening.

Mr. Weir moved that Mr. Stoy have permission to present a remonstrance and certain other papers. Carried. And the remonstrance was received and read.

And Mr. Sandford moved that the same be referred to a select committee of 5, to be appointed by the president. Mr. Weir moved to amend by asking that the said committee also examine and consider the original petition asking for the city's subscription, as handed into the council August 27th, 1853; which was accepted, and Mr. Sandford's motion, with the amendment, was carried. Whereupon the president named Messrs Sandford, Weir, Stoy, Peirce, and Bradly as the committee.

The papers accompanying the remonstrance, viz, the proceedings of a meeting of citizens held at the court-house on Saturday night last, were read and on motion referred to the same select committee.

(See pages 144, 145, journal of proceedings No. 5.)

At an adjourned meeting of the common council, held on Wednesday March 7th, 1855, among others were the following proceedings:

The select committee appointed by his honor at the last meeting reported as follows:

"Mr. PRESIDENT: The committee to whom was referred the remonstrance of certain citizens of New Albany against ratifying the subscription of the city to the New Albany and Sandusky City Junction Railroad Company, together with the proceedings of a public meeting upon the same subject, and the original petitions upon which such subscription was made, respectfully beg leave to report:

"That said city did, on the 18th day of November, 1873, upon the petition of more than three-fourths of the legal voters, make a subscription for 8,000 shares of the stock of said railroad company, amounting to $4,000,000; that at the time said subscription was made the en-
69 terprise was regarded as one of immense importance to the interest and prosperity of the city; it was made with the approbation of a very large majority of the tax-payers. It also appears that, when it was

ascertained that the subscription of the city could not be made available, the company was thrown into a state of great embarrassment, and appeals were made to our citizens for additional aid by way of individual subscriptions, to enable it to put the road under contract; but there seems to have been no assurance by the company or by the city council that the city subscription was considered as abandoned. By the aid of such individual subscriptions the whole line of road was put under contract upon favorable terms, and several miles of the grading has been nearly finished. Something more than a year ago the company entered into a contract with the Mad River and Lake Erie and the Sandusky and Louisville Railroad Company, by which the latter agree, upon certain conditions, to guarantee the bonds of said company to the amount of ten thousand ($10,000) per mile of road. This guarantee will amount to more than $1,000,000, and has always been considered of very great importance as an aid to the New Albany company. One of the conditions upon which it was to be made was that the company should first procure a good subscription list to the amount of $700,000. It appears that the whole subscription list of the company, including real estate and excepting the subscription of the city, amount to only $353,000. The committee are informed by the company that without the aid of the city subscription they have no hope of procuring such an amount as will entitle them to the guarantee of the other companies, and some of the committee have had an interview with Mr. Howard, the principal contractor for the construction of the road, and have been unequivocally informed by him that, if the city should repudiate the subscription made, the credit of the road would be so entirely destroyed that it will be impossible to construct it, and he shall request the company to rescind his contract, and to show no obstacle in the way of terminating the road at some other point on the Ohio River. He states, however, that as to the real estate which has been subscribed and about which much complaint has been made, he is willing to take it all at the price subscribed in place of the same amount of stock which he is to receive pursuant to the terms of his contract. The committee are therefore constrained to believe that unless this subscription is ratified the terminus of this important road will certainly be lost to this city; but, as the subject referred were accompanied by no instructions, they desire simply to report the facts so far as they have been able to ascertain them, that the council may take such action as may be deemed expedient.

"STEWART SANDFORD,
"AUGUST BRADLEY,
"W. M. WEIR,
"JAMES PEIRCE,
" *Com't.*

"To the MAYOR and COUNCIL *of New Albany.*"

Mr. Bradley moved that the report be received and concurred in by the council.

The ayes and noes being demanded, the motion was carried by the following vote: Ayes, Bradley, Bushnell, Kent, Knapp, Peirce, Sandford, and Weir—7 votes. Noes, Stoy, St. John, Tounsand, and Wilson—4 votes.

(See journal of proceedings No. 5, pages 148, 149, and 150.)

70 At a regular meeting of the common council, held on Tuesday, October 2d, 1855, among others were the following proceedings:

Mr Tounsand moved that a committee be appointed of three to vote the stock of the city for the directory of the New Albany and Sandusky City Junction *Junction* R. R. Co. at the approaching election. A ballott being called resulted as follows: the election of Messrs. Crane, Pierce, and Tounsand, committee.

(See journal of proceedings No. 5, page 286, 287.)

At a called meeting of the common council, held on October 26th, 1855, among others were the following proceedings:

Mr. Tounsand moved that there be a committee of two, to consist of Messrs. Crane and Wilcox, to confer with Captain James Montgomery, the president of the N. A. and S. C. J. R. R. Co., and ascertain the amount of new stock subscribed, and by whom, and a full report of the late election held for a directory for said company. Carried.

(See journal of proceedings No. 5, page 298.)

At a regular meeting of the common council, held on Tuesday evening, April 5th, 1856, among others were the following proceedings:

Mr. Crane, from select committee, made the following report:

"Mr. PRESIDENT: The special committee to whom was referred the matter of an examination of the N. A. and S. C. Junction R. R. books, &c., to ascertain the amount of newly-subscribed stock, and by whom, and to make a full report of the late election held for the directory of said road, would make the following report:

"That they have examined the books and papers relative to the late election, and find that there was 21,110 votes cast at said election, and that the following-named persons recorded the number of votes opposite their names:

James Montgomery	12,794
John S. Davis	12,778
John S. McDonald	11,784
T. L. Smith	12,383
W. M. Weir	12,784
W. B. Lent	12,784
B. F. Deval	12,778
J. B. Winstandly	12,778
J. C. Moody	12,204
John Briggs	8,338
G. G. Carrill	8,338
P. M. Kent	12,456
Ja's Peirce	21,110
J. A. Moffatt	20,725
V. A. Pepin	20,800
David Crane	8,338
J. B. Anderson	8,710
J. B. Ford	8,666
P. M. Wilcox	16,363
J. P. Smith	8,338
J. K. Woodward	8,666
Tho's Conner	8,344

"Your committee find that there is stock subscribed in said company by sundry corporations and individuals to the following
71 amounts, that is, allowing the original subscription to the articles of associations to be three hundred dollars per name, has charged on the ledger of said company.

Cash subscriptions	86,150 00
Clark Co. plank-road	63,000 00
Real estate subscribed	283,206 00
Stock payable in work	306,590 00
City of N. Albany	400,000 00
	$1,138,946 00

"SUMMARY.

"Number of shares subscribed	22,778 46/100
" " " voted	21,110
" " " not voted	1,668

"Furthermore, your committee cannot find that there has been any subscription to the stock of said company since June 5th, 1854, except the stock subscribed by the Messrs. S. and C. Howard *which* to which I find no date, but is dated the ledger of said company in the account of said Howard, September 5th, 1855; said subscription is to the amount of $306,590, payable in work.

"Your committee have complied with the requirements set forth in said resolution as they understand it.

"DAVID CRANE,
"P. M. WILCOX,
"*Committee.*"

Mr. Tounsand moved to accept the report and instruct the clerk to enter it upon the minutes, and that the same be published with the minutes. Carried.

(See journal of proceedings No. 5, pages 388, 389.)

At a regular meeting of the common council of the city of New Albany, held on Monday, September 15th, 1856, among others were the following proceedings:

Mr. Davis offered the following:

Resolved, That the mayor be, and he is hereby, instructed to cast the vote of the city for directors in the New Albany and Sandusky City Junction Railroad Company at the approaching election for directors, and that he vote for such persons as in his judgment will best promote the interests of the city and company.

The ayes and noes were taken under the rule. Affirmative, Mess. Bentley, Davis, Dorsey, Howk, Hill, Kent, Powell, Peirce, and Sandford—9.

No member voting in the negative.

(See journal of proceedings No. 5, pages 536.)

I, Mathew J. Huette, city clerk of the city of New Albany, Floyd County, Indiana, hereby certify that the foregoing is a true copy, as taken from the record on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said city, on this the 15th day of January, 1869.

[SEAL.] MATTHEW J. HUETTE,
City Clerk.

72 Depositions of Elijah Sabin, Thomas L. Smith, and Mathew J. Huett, witnesses produced and sworn before me, a notary public in and for the county of Floyd, and State of Indiana, on the 15th day of January, 1869, pursuant to the enclosed notice, said depositions being taken on the part of the complainants in an action now pending in the circuit court of the United States, district of Indiana, wherein Heman Ely et al. are complainants, and the New Albany and Sandusky Junction Railroad Company et al. are defendants.

Elijah Sabin, being duly sworn, on oath deposes and says:

1. Question by the complainant. State your name, age, and residence.

Ans. Elijah Sabin; aged 47; New Albany, Indiana.

2d. Question by same. State whether you were ever city clerk of the city of New Albany, Indiana, and, if so, when; also, how long you have resided in New Albany.

Ans. I was city clerk of the city of New Albany Indiana, in 1852, 1853, and 1854, going out of office in the spring of 1855. I have resided in New Albany, Ind., since 1850, excepting from 1857 to 1861, during which time I resided in the country.

3d. Question by the same. State what knowledge you have, if any, as to the existence and present whereabouts of the original petition presented to the city council of New Albany to subscribe for stock in the New Albany and Sandusky City Junction Railroad Company.

Ans. During the time I was city clerk there was a petition signed and presented to city council to subscribe stock to the New Albany and Sandusky City Junction R. R. Company; said petition was among the files of city clerk's office when I returned, according to my best recollection and belief; of its present existence and whereabouts I know nothing.

4th. Question by the same. State whether you have any recollection of the number of names signed to said petition, and when and where you last saw the petition.

Ans. I have no recollection of the number of names on said petition; they were very numerous. The last time I saw said petition or petitions was one day, during the taking of testimony, in what was known as the "Pop-corn court," in 1856 or 1857.

5th. Question by the same. State whether the circulation of said petition was open and notorious, or privately and secretly; state fully in this respect.

Ans. The circulation of said petition was open and notorious, a matter of public interest and discussion, talked of freely among the people, and the public were generally informed of the matter.

ELIJAH SABIN.

Also came Thomas L. Smith, and, being duly sworn, deposes and says:

1. Question by complainants' solicitor. State your name, age, and residence.

Ans. My name is Thomas L. Smith; my residence is in the city of New Albany, Indiana; and my age is over sixty years.

2d. Question by the same. State how long you have resided in New Albany; your occupation during said time; what city offices, if any, you have held, and what offices, if any, you held in the New Albany and Sandusky City Railroad Company.

Ans. I have resided in New Albany since the year 1839; my occupa-

tion has been that of an attorney at law; I have never held any
73 city office; I was a member of the board of directors of that company for some years—I cannot remember how long; and I was also secretary of that board a part of the time.

3d. Question by the same. State whether you were attorney for the trustees, Pierson and Seymour, in the case of Victor A. Pepin against The New Albany and Sandusky City Junction Railroad Company, Pierson, Seymour, and others, in the Floyd circuit court, in 1857, and whether you were attorney for the said railroad company in said case; also, whether you were attorney for Heman Ely and others, in the partition suit of Ely and others, heard in said court in 1858.

Ans. As one of the firm of Smith and Kerr, attorneys at law, I appeared for the trustees in the Pepin case and filed their answer. I was not, I think, attorney for the railroad company in that case. Our firm of Smith and Kerr appeared as attorneys for Heman Ely and others, in the partition suit mentioned in the question.

4. Question by the same. State whether you were ever authorized by Heman Ely and others, holders of the real-estate bonds of the said railroad company, to compromise or settle with said company, or take any real estate or other property in payment or satisfaction of such bonds or the judgment rendered thereon.

Ans. I never was authorized to make any such settlement for them, and never did. There was a written contract signed by myself, Heman Ely, and others, relative to the purchase of property under the judgment in the case of Pepin and others above mentioned, and also under another judgment in favor of Pepin against certain other parties.

5. Question by the same. Please look at the paper now shown you, marked "A," and state in whos' handwriting it is, and whether it is the agreement mentioned in your last answer or a true copy thereof.

Ans. The paper marked "A," is in my handwriting, and purports to be a copy of the original agreement made by the parties whos' names are attached thereto. I have not now an opportunity to compare it with the original, and I do not know where the original is, but I presume it is a true copy.

6. Question by the same. State whether you were present at the trial of the case of William Lindley vs. The above-named railroad company, Putnam, Pierson, Ely, and others, before Judge Jewett, in the circuit court of Floyd County, about a year ago, and whether you were a party and witness in said case.

Ans. I was present at the trial of that case; was a party and a witness.

7. Question by the same *by the same.* State whether you have any personal recollection in regard to the fact of compromise, settlement, or payment of said bonds, and judgment thereon being litigated in said case before said Jewett.

Ans. The original contract, of which the paper marked "A" is a copy, was in evidence in that case, and there was also evidence of a subsequent agreement relative to the distribution of the property bid in, or to be bid in, under the two judgments mentioned in that contract.

8th. Question by the same. State whether you have any knowledge as to the petitions filed by the citizens to subscribe for stock in the New Albany and Sandusky City Junction R. R. Co. above named, or of its presence existence. State fully all you know about it.

Ans. I know there were such petitions, but I have no knowledge at all as to their present existence, or what became of them.

9th. Question. State whether you ever knew or heard of any suit being brought by any resident or property owner in the city of
74 New Albany for the purpose of preventing or enjoining the common council of said city from subscribing for railroad stock in said railroad company, or from ratifying the same.

Ans. never knew or heard of any.

THOMAS L. SMITH.

Here follows the paper referred to as Exhibit A by this witness:

Whereas a sale of the lots and lands mortgaged by the New Albany and Sandusky City Junction Railroad Company to Harvey Seymour and William L. Pierson, jun., esq's, to secure the payment of one hundred and ten bonds issued by said company and known as the real-estate bonds of said company, was made by Charles Fredrick, esq., commissioner, the 30th of March, 1858, by virtue of a judgment and decree of the Floyd circuit court, at its last October term, at the suit of Victor A. Pepin against said railroad company and others:

And whereas it was deemed advisable by the undersigned parties entitled to the benefit of said judgment and decree to prevent the undue sacrifice of said property that Victor A. Pepin and Michael *E.* Kerr should bid off such parcels of said property as should not be sold at an adequate price to others, for the benefit of all the parties hereto, with a view to enable them to realize, if possible, the amounts of their several claims by a subsequent sale of such property, and said Pepin and Kerr did, accordingly, bid off a large quantity of said lots and lands:

And whereas said sale by said commissioner did not produce a sufficient amount to satisfy the judgments of the undersigned parties, and there *is* other properties of the said railroad company which may be levied upon to satisfy their said judgment and decree, a part of which has been mortgaged by said railroad company to John S. McDonald Charles B. Applegate, John S. Davis, William B. Lent, Victor A. Pepin, William M. Weir, James Montgomery, and Thomas L. Smith, further to secure them in the payment of five bonds filed by each of them in the suit in which said judgment and decree was rendered, and suit has been brought by them to foreclose said mortgage, with a view to the settlement of all questions that may arise relative to the rights of the parties hereto.

It is agreed:

1st. That all of said property so bid off shall be conveyed by the commissiopers making such sale to the said Victor A. Pepin and Michael C. Kerr, in trust for the use and benefit of said several parties.

2d. That such conveyance shall contain a power to said Pepin and Kerr, to sell and convey any and all of said lots and lands, or any part thereof, at public or private sale, for the benefit of the undersigned parties, at such prices and upon such terms as to the time and mode of payment and the giving security for payment as they may deem expedient.

3d. That at any future sales of any property under the judgment and decree already rendered, or under any judgment to be obtained in the for'closur' suit now pending, the saide Pepin and Kerr shall purchase and hold for the benefit of the undersigned parties all property not bid off at reasonable prices by other persons, in the same manner and for the same purposes as at the sale already made.

4th. That the proceeds of all sales already made to other persons, as well as of all sales hereafter to be made under said judgment and

decree, or any judgment or decree in said foreclosure suit now pending, shall be paid by the commissioner or sheriff making the sale to said Pepin and Kerr, to be collected and applied by them as herein provided.

75 5. The proceeds of the sales made by said Pepin and Kerr and all other money received or collected by them under this agreement, shall, as soon as received, be applied as follows: 1st. To the payment of all costs of suit and expenses of sale. 2d. To the payment of any taxes or other charges which are liens on said property, or any of it. 3d. To the payment to William Pierson, jun., and Harvey Seymour, the trustees mentioned in said mortgage of said railroad company, five hundred dollars each for services as such trustees, and one hundred and fifty dollars each for their expenses incurred in the discharge of their trust, with interest upon said sums from the date of the decree until paid. 4th. To the payment of all the claims of the parties hereto entitled to the benefit of said judgment and decree, pro rata, with the following exceptions, that is to say: They shall apply all the proceeds of the sales of the property mentioned in the said mortgage, now in process of foreclosure, exclusively to the payment of the costs of that suit, and of the several debts secured by that mortgage, until the said John S. McDonald, Charles B. Applegate, John S. Davis, William B. Lent, Victor A. Pepin, William M. Weir, James Montgomery, and Thomas L. Smith shall each have received out of the proceeds of the sales of said propery, together with their pro rata proportion of the proceeds of the sales of other property, the sum of two thousand and five hundred dollars, with interest from this date, which will be fifty per centum of the amount of the five bonds held by each of them, and included in said judgment and decree. And after said sum of $2,500 shall have been paid to the said parties last above mentioned, with interest as aforesaid, the whole of the proceeds of all the property, as well that covered by said mortgage now in process of foreclosure as any and all other property or receipts coming to the hands of said Pepin and Kerr as aforesaid, shall be applied exclusively to the payment of the other creditors named in said judgment and decree, pro rata, until each and all of them shall have received a sum equal to fifty per centum of the face of the bonds held and filed by them respectively, with interest to the time of such payment from this date, and, after all the undersigned parties shall have thus been made equal by the receipt of fifty per centum of the face of the bonds held and filed by them, the proceeds of all sales of any and all property mentioned in this agreement shall be distributed pro rata to the several parties hereto according to the amount of the judgments severally rendered in favor of each of them.

6th. In case it should be necessary, in the opinion of said Pepin and Kerr, to raise any money for the payment of the aforesaid costs, charges, and expenses, before the same can be realized from the sale or receipts of said property, they may make a pro rata assessment according to the amounts of the several claims of the undersigned, payable upon reasonable notice, and the undersigned agree to pay such assessments.

7th. The said Pepin and Kerr shall receive five per centum on the amount of sales made by them in full compensation for all their services in making such sales, and collecting and distributing the purchase-money, and they shall semi-annually make out a statement of all their accounts in the discharge of their duties and trusts for the information of any of the parties interested.

8th. In case of the death of said Pepin or Kerr, or the refusal of

either or both to execute the duties of the trusts conferred upon them, any of the parties hereto, after reasonable notice shall have been given to each of the other parties, may apply to the Floyd circuit court,
76 or the judge thereof, in vacation, to appoint some suitable person to fill such vacancy or vacancies, and such person or persons so appointed shall perform all the duties and trusts aforesaid.

9th. The said Pepin and Kerr shall collect and receive all rents now due or to become due from any of said property and apply the same as hereinbefore provided.

10th. It is also agreed that the said Pepin and Kerr may, in their discretion, sell to any of the parties hereto any of said property, not exceeding forty per centum of the amount of the bonds originally filed by them, in liquidation of so much of their interest in said judgment and decree, and any judgment to be rendered.

In testimony whereof the said parties have hereunto set their hands this 31st day of March, 1858.

JOHN S. McDONALD.
SAM'L H. PATTERSON,
By J. S. DAVIS.
JOHN S. DAVIS.
WILLIAM M. WEIR.
WILLIAM B. LENT.
V. A. PEPIN.
C. B. APPLEGATE.
J. MONTGOMERY.
A. H. MOSS,
By W'M S. PIERSON.
THO'S L. SMITH.
JOHN PHELPS PUTNAM.
SARAH COIT DAY,
SAMUEL T ANDE'SON,
ELIJAH DEWITT,
ROLLIN C. DEWITT,
GEORGE R. STARR,
HORACE C. STARR,
CHARLES ARTHER ELY,
By HEMAN ELY, *their Attorney.*
HEMAN ELY.

The undersigned agree to accept the trusts conferred in the foregoing instrument.

MICHAEL KERR.
V. A. PEPIN.

Matthew J. Huette, being duly sworn, deposes and says:

1. Question by the complainants' solicitor. State your residence and occupation.

Ans. My residence is New Albany, Indiana. I am city clerk of the city of New Albany. I have the city records, and books, and papers belonging thereto in my possession.

2. Question. State whether you have made search among the papers in your office to find the petition of the citizens of New Albany for the city to take stock in the New Albany and Sandusky City Railroad Company; and, if so, did you find it?

Ans. I have made reasonable search, and have failed to find them.

MATTHEW J. HUETTE,
City Clerk.

77 STATE OF INDIANA, *County of Floyd*, ss:

I, John O. Green, a notary public in and for said county and State, hereby certify that the above-named Elijah Sabin, Thomas L. Smith, and Matthew J. Huette were by me first duly sworn, according to law, to testify the truth, the whole truth, and nothing but the truth relating to said cause; that all the questions were written in my presence by S. Burke; that the answers in the depositions of said witness Elijah Sabin, written by himself in my presence, and under my direction; and that the answers in the depositions of said witnesses Thomas L. Smith and Matthew J. Huette were reduced to writing by me; that the said defendants were present by Thomas L. Smith, their attorney, during the examination of said witnesses Elijah Sabin and Matthew J. Huette, and by their attorney, Robert M. Weir, esq., during the examination of said witness Thomas L. Smith; that the complainants were present during the examination by their attorney, S. Burke, esq., and said depositions were taken at the office of the clerk of the Floyd circuit court, in the city of New Albany, in the county of Floyd and State of Indiana, on the 15th day of January, A. D. 1869, between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said day.

In testimony whereof I have hereunto set my hand and official seal this 15th day of January, 1869.

[SEAL.] JOHN O. GREEN,
Notary Public.

HEMAN ELY ET AL.
v.
THE CITY OF NEW ALBANY AND OTHERS.

It is admitted and agreed by counsel and the parties to the above-entitled suit as follows:

1st. That the record of the acts and proceedings of the New Albany and Sandusky City Junction Railroad Company, marked "A." and subscribed by counsel, is the true and correct record of the acts and proceedings of said company as far as the same purport to be entered therein, and that said book may be used as evidence herein without further proof.

2d. That one hundred thousand dollars in bonds of the city of New Albany were issued and delivered to said railroad company before the alleged ratification of the subscription by said city, and one hundred thousand dollars thereafter; and that in pursuance of the adjustment and compromise made between said company and said city, as set forth in the pleadings herein, one hundred and ninety-three thousand dollars of said bonds were surrendered by said company to said city for cancellation, and the remaining 7 are outstanding, and the city has paid the interest thereon.

3d. That no part or portion of said railroad was ever, in fact, completed by said company, but large amounts of money were expended in work on the same.

That all ordinances of the city of New Albany enacted at any time in reference to or upon the subject of its subscription aforesaid, or any adjustment or compromise thereof, or of any matter in any way arising out of or connected therewith, may be used in evidence herein, without further proof, and that they are all correctly printed and published in the book of ordinances of the city of New Albany, printed in 1857.

That the certified record now on file, with the pleadings herein,
78 in the case of William Lindley vs. the said railroad company

and others, from the Floyd circuit court, may be used in evidence here so far as competent evidence, without any further authentication or proof; and that all records of other litigation or proceeding in said Floyd circuit court, which are incorporated in and made part or parts of the record in said Lindley case, may also be used as evidence herein, so far as competent, without any further authentication or proof; and that either party to the above-entitled action of Ely et al. vs. said city, may hereafter procure and use as evidence on the trial thereof, as far as competent evidence, any record or records of any other suit or suits in said Floyd circuit, directly or indirectly affecting or relating to the subject-matter in controversy in the above-entitled suit, having any such record certified in the usual manner by the clerk of the court.

6th. That all the books of account or proceedings of said railroad company, to wit, the general-ledger, stock-ledger, balance-ledger, liability-ledger, cash-book, and the two journals may be used as evidence on the trial of said cause, without further evidence or proof of identity, as far as they are competent in law. That the records of any suits instituted by any persons in any court of Floyd County, Indiana, against said city, to restrain or enjoin the collection of any tax or taxes imposed by said city on account of or to pay interest or principal of any bonds issued by said city to said railroad company, may be used as evidence, so far as legally competent on the trial of this case, without further proof or authentication than the usual certificate of the clerk of such court in which said cases or suits were instituted or prosecuted.

It is further agreed that the ordinances of the city of New Albany, relating to the subscription of stock and the final compromise made with the railroad company, were duly recorded and published immediately after the same had been passed by the city council, in accordance with the charter of the city and laws of the State requiring the publication and recording thereof.

It is further agreed that the affidavits of the several subscribers to the articles of association named in the bill of complaint in this suit, and who have filed answers by George V. Howk and Tho's L. Smith, and by Hendricks, Hord and Hendricks, attorneys for defendants, as defendants, that they have paid the sum of $300 each upon the stock subscribed on said articles by them, and that they have paid all the other stock in said company subscribed severally by them since that date in full, and that they have severally transferred to the city of New Albany all of the stock originally subscribed by them in excess of three hundred dollars, stating the time as accurately as possible of such transfer, shall be received and read on the hearing of this cause as legal and competent evidence of the facts above referred to on behalf of the defendants; the several assignments to said S. Burke, if admissible in evidence, may be offered and received without formal proof of the execution. The pl'ff does not waive the production of record evidence of the city accepting the above assignments.

S. BURKE, *Att'y for Pl'ffs.*
GEORGE V. HOWK,
THO'S L. SMITH, and
HENDRICKS, HORD AND HENDRICKS,
For Defendants.

79 Here follow copies of sundry assignments offered in evidence:

State of Indiana, Floyd County, ss, in the circuit court.

VICTOR A. PEPIN
v.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Comp'y, William S. Pierson, Harvey Seymour, and others.

Judgment the defendants William S. Pierson and Harvey Seymour, as trustees for bondholders Heman Ely, Augustus H. Moss, and others, for the sum of $54,855, and costs of suit, November, A. D. 1857, of which amount $1,035 was recovered for the use and benefit of Augustus H. Moss. For value received I hereby sell and assign to Stevenson Burke all my interest, right, and title in and to the above judgment, and all rights, liens, equities, and interests belonging to me, or growing out of the same. This assignment is subject to all unpaid costs, taxes, and assessments, and said Burke is authorized to collect said judgment at his own costs and expenses, either in my name or otherwise, as he deems most to his benefit, but as to save me harmless from costs, att'y's fees, and expenses.

November 21, 1867.

AUGUSTUS H. MOSS. [SEAL.]

State of Indiana, county of Floyd, in the circuit court.

VICTOR A. PEPIN
v.
WILLIAM S. PIERSON, JR., AND HARVEY Seymour, trustees, Samuel J. Andrews and wife, N. A. & S. C. J. R. R. Co., et al.

Judgments for defendants as such trustees on the 14th day of November, A. D. 1857, for the sum of fifty-four thousand eight hundred and fifty-five dollars and costs of suit. For value received we hereby sell, assign, and transfer to Stevenson Burke, of Elyria, three thousand and one hundred and five dollars of the above judgment or decree, that being the amount of said judgment which was recovered by said trustees for our use, and we hereby sell, transfer, and assign to said Burke all property, real and personal, held by Heman Ely, esq., or others, as the proceeds of said judgments for our use, and we authorize him to possess himself as fully of all benefit of said judgment or decree, and the bonds on which the same was rendered, and the real and personal property, rights, and equities belonging to us by reason thereof as fully as we ourselves could do. This assignment is made subject to the unpaid assessments and costs in said case and touching said property.

SAM'L J. ANDREWS. [SEAL.]
CATHARINE D. ANDREWS. [SEAL.]

Witnessed by—
THOMAS M. DAY.
E. P. DAY.

Dated at Hartford, Conn., Dec. 9th, 1867.

80 State of Indiana, Floyd County, ss, in the circuit court, November 14th, 1857.

VICTOR A. PEPIN
v.
N. A. AND S. C. J. R. R. Co., WILLIAM S. Pierson, jr., and Harvey Seymour, trustees for Rollin C. Dewitt, and others.

Judgment for said Pierson and Seymour as trustees, against said R. R. Co., for fifty-four thousand eight hundred and fifty-five dollars and costs of suit, of which amount five thousand one hundred and seventy-five dollars ($5,175) was recovered for the use of Rollin C. Dewitt, and seven thousand two hundred and forty-five dollars ($7,245) for the use of Elijah Dewitt, and four thousand one hundred and forty dollars for the use of George R. and Horace C. Starr. For value received we hereby sell, assign, transfer, and set over to Stevenson Burke, of Elyria, Ohio, the several amounts and shares of the above-named judgment standing in our name, and recovered severally for our use and benefit, and authorize him to collect the same in our name, or otherwise as he may see fit, at his own costs.

HORACE C. STARR. [SEAL.]
ELIJAH DEWITT. [SEAL.]
ROLLIN C. DEWITT. [SEAL.]
GEORGE R. STARR. [SEAL.]

ELYRIA, *November 18th*, 1867.

The State of Indiana, Floyd County, ss, in the circuit court, October term, 1857.

VICTOR A. PEPIN
vs.
WILLIAM S. PIERSON, JR., AND HARVEY Seymour, trustees, Sarah Coit Day, and others, including N. A. & S. C. J. R. R. Co.

Judgment for the defendants Pierson and Seymour, November 14th, 1857, for said trustees for the sum of fifty-four thousand eight hundred annd fifty-five dollars and costs of suit, of which sum five thousand one hundred and seventy-five dollars was recovered for the use of Sarah Coit Day. The said Sarah Coit Day having departed this life, and the undersigned having been duly constituted her personal representative, for value received I hereby sell, assign, transfer, and convey to Stevenson Burke, of Elyria, Ohio, so much of the above judgment or decree as was recovered for the use of said Sarah Coit Day, and all the real estate held by Heman Ely, esq., of Elyria, Ohio, in trust for her or her heirs upon account thereof, and all property, real and personal, growing out of said judgment, and all rights, equities, and interests accruing therefrom, and all right and title to the bonds belonging to said Sarah Coit Day, upon which said judgment and decree was rendered, so that said Burke shall have and hold all the right and title to said bonds, judgment, and decree which belonged to said Sarah Coit Day or her personal and real representatives, and he is hereby authorized to collect said judgment and sell and dispose of said real property for his
81 own use and benefit, but at his own costs and charges; and said

Burke is to take this assignment subject to all unpaid assessments upon the property.

Dated at Hartford, Con., Dec. 9th, 1867.

THOMAS M. DAY, [SEAL.]
Executor of Sarah Coit Day.

Witnessed by—
W. J. ANDERSON.
CHA'S W. LUCAS.

In the circuit court of Floyd County, Indiana.

VICTOR A. PEPIN
v.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Judgment on the 14th day of November, 1857, vs. said railroad company, and in favor of William S. Pierson and Harvey Seymour, as trustees for $54,855, of which sum four thousand one hundred and forty dollars was for the use of George R. and Horace C. Starr, the interest of said George R. and Horace C. Starr having been assigned to me. For value received, I hereby sell and assign said interest of $4,140, heretofore belonging to said Starrs, to Heman Ely, without recourse on me.

STEVENSON BURKE. [SEAL.]

ELYRIA, *December 20th*, 1868.

An ordinance to compromise and settle with the New Albany and Sandusky City Junction Railroad Company, and for the settlement of the suits now pending in the Floyd circuit, in which John Briggs and Peter Tellon are plaintiffs, and The City of New Albany and others are defendants.

Passed August 17, 1857.

Section 1, recital and preamble; 2, mayor authorized to compromise; 3, railroad company to deliver up bonds, &c.; 4, city assumes the payment of certain debts; 5, city shall pay the costs of certain suits, &c.; 6, duties of railroad company; 7, repeal; 8, when ordinance shall take effect.

SECTION 1. Whereas it has been represented to the common council of the city of New Albany, by the report of the president and directors of The New Albany and Sandusky City Junction Railroad Company, issued April 30th, 1857, that said company have suspended all operations upon the work of said railroad; and whereas it is shown, by the report of said company, that they have expended all the cash and real estate which said company received for stock in said railroad company, and, furthermore, it is shown by the report of said company that they have pledged the bonds issued to said company by the city of New Albany to sundry persons, for sundry amounts, although the validity of said bonds are questioned, and a suit is now pending in the Floyd circuit court to test the validity of the bonds issued to said railroad company by the city of New Albany; and whereas it has been represented to the common council of the city of New Albany that the said New Albany and Sandusky City Junction Railroad Company wish to com-

promise with the said city of New Albany, and deliver up the bonds of the city: Therefore—

82 SECTION 2. *Be it ordained by the common council of the city of New Albany*, That Franklin Warren, mayor of said city, be, and he is hereby, authorized, empowered, and directed, in the name and on behalf of said city, to settle and compromise with the New Albany and Sandusky City Junction Railroad Company on the terms hereinafter stated.

SEC. 3. The New Albany and Sandusky City Junction Railroad Company shall deliver to the mayor of the city of New Albany, all the bonds and coupons which the city of New Albany issued to said railroad company, (except seven bonds now in the hands of third parties, and the coupons which have been paid for by the city previous to the date of this ordinance,) and cancel the subscription of stock subscribed for by said city, and shall consent to the repeal of all ordinances and amendments to ordinances in conflict with the provisions of this ordinance.

SEC. 4. The city of New Albany hereby agrees and binds herself, immediately after said bonds and coupons are surrendered, *and* repeal all ordinances, as contemplated by the provisions of this ordinance; and, on the cancelling of said railroad subscriptions, then, and not before, to assume and pay to the Ohio Insurance Company the sum of thirty-six thousand dollars, which said New Albany and Sandusky City Junction Railroad Company is now owing to said insurance company, which debt is now due; the same may be paid and reserved out by said city, according to the rules of said company; but the first call and renewal may be paid by the city in city orders, at cash rates.

SEC. 5. The city of New Albany shall assume and pay all the costs in the suits heretofore dismissed, or now pending, wherein John Briggs and Peter Tellon were and are plaintiffs, and the said city, railroad, and others are defendants, brought to test the validity of the tax assessed by said city for Sandusky City Junction Railroad purposes; also the fees of the attorneys of said Tellon and Briggs, as agreed between them and their said attorneys, and said city, and attorneys of said railroad company; and shall also consent that the Floyd circuit court, at its ensuing session, may, on the application of said Tellon and Briggs, enter in each case an order and decree, perpetually restraining and enjoining said city, her officers, as also the said railroad company, from taking any further steps to enforce or collect any tax or taxes assessed against said Tellon and Briggs, for New Albany and Sandusky City Junction Railroad Company purposes, and vacating and annulling all sales of their property heretofore made therefor; and the said city shall at once redeem any and all property by the city collector sold for the taxes, for the purposes of said railroad, and said city shall make provisions for all persons who have paid taxes on account of said railroad.

SEC. 6. The New Albany and Sandusky City Junction Railroad Company shall use all reasonable measures to make such arrangements as will eventually secure the completion of said road according to the plan contemplated in the organization of the aforesaid railroad company, and that said road-bed and appurtenances shall never be used for any other than railroad purposes; and whenever any part or portion of said road is completed and put in use, the southwestern terminus thereof shall be at New Albany.

SEC. 7. All ordinances and amendments to ordinances in conflict with the provisions of this ordinance be, and the same are hereby, repealed.

SEC. 8. This ordinance shall be in force, and take effect on and

83 after its due publication, and the due acceptance of said ordinance by the New Albany and Sandusky City Junction Railroad Company.

Depositions of sundry witnesses taken in action pending in the circuit court of the United States for the district of Indiana, wherein Heman Ely et al. are plaintiffs, and The New Albany and Sandusky City Junction Railroad Company et al. are defendants, on the part of the plaintiff, at the place hereinafter mentioned—Hon. S. Burke appeared on behalf of the plaintiffs; the defendants did not appear by attorney or otherwise.

Heman Ely, of the county of Lorain, in the State of Ohio, of lawful age, being first duly sworn according to law, as hereinafter certified, deposes as follows:

1st. Question by plaintiffs' attorney. State your name, age, residence, and if you are one of the plaintiffs in the above cause.

Ans. My name is Heman Ely; my age, 48 years; I reside in Elyria, Ohio; I am one of the plaintiffs in the above action.

2d. By the same. State whether you held some of the bonds of the above-named railroad company in 1856 & '7; if so, how many and what became of them?

Ans. I did hold of the real-estate bonds of said company on and previous to July, 1867, eight thousand dollars. I held them in my own right. Said bonds were reduced to judgment in a suit commenced in Floyd County, Indiana, in Nov., 1857, by Victor P. Pepin, against said railroad company, the trustees Pierson and Seymour, and others. In the latter part of March, 1858, I was present at the sale of the real estate described in the mortgage from said railroad company to the above-named trustees Pierson and Seymour. I then had with me the eight $1,000 bonds above referred to. I also had with me 44 bonds of like description held by the following parties, to wit: C. Arthur Ely, fourteen; Elijah Dewitt, seven; R. C. Dewitt, five; George R. and H. C. Starr, four; Sarah Day, five; Catharine D. Andrews, three; John P. Putnam, six; all of which bonds I placed in the hands of Smith and Kerr, attorneys for said bondholders. I was acting for myself and the other bondholders above mentioned.

3d. By the same. State what, if any, agreement you ever entered into with the said railroad company, by which you received from it the real estate, or any part of the real estate, described in said mortgage, or any other real estate.

Ans. I never entered into any agreement whatever concerning real estate, or on any other matter, with said railroad company.

4. By the same. State what agreement you ever authorized any person to make with said railroad company in respect to real estate on behalf of yourself or others.

Ans. I never authorized any one to make any agreement or agreements on that subject or any other subject, either on my own behalf or on behalf of anybody els', with said railroad company.

5. By same. State what proposition said railroad company made to you, if any, to take any real estate in payment, satisfaction, or extinguishment of the indebtedness upon said bonds to yourself and others.

Ans. I have never received any propositions from the said railroad company on that subject, and have never had any communications with said company, either written or verbal, on that or any other subject.

84 6th. By the same. State whether the part of the property described in said mortgage partitioned to you was received by you in any other manner than is shown by the deeds and records in Floyd County, Indiana, in respect thereto.

Ans. It was not received in any other way, so far as I know, and, to the best of my knowledge, the records of Floyd County, Indiana, show the true state of the case in respect to that property.

7th. By the same. State whether you ever agreed or authorized any one else to credit upon said indebtedness, bonds, or mortgage, or judgment rendered thereon to said railroad company, anything further or more than the real estate sold for at public sale upon account thereof; if so, state such agreement or authority fully and particularly.

Ans. I never made or authorized any such agreement; so far as I ever knew or authorized, the real estate was taken at the price it sold for at public sale, and was to be credited at the price at which it sold.

8th. By same. State from whom you received your eight bonds, and, so far as you know, from whom the others, held by other parties, were received.

Ans. My bonds, and also the other bonds above referred to, were received from the contractors Sebra and Charles Howard.

9th. By same. State what knowledge or information you ever had of any compromise or agreement between said railroad company and the city of New Albany, by which said city was released from the payment of its bonds issued to said railroad company for its stock, and by which it was released from its subscription to the stock of said company.

Ans. I never heard of any such transaction till so informed by my attorney, S. Burke, within the year last past.

10th. By same. State what knowledge you had at the time of the partition of said real estate, or at any time previous thereto, that any of the real-estate bonds held by Montgomery, Smith, Weir, or other persons, at New Albany, were held by them only as collateral security, and that they were not entitled to judgment thereon for the full amount thereof.

Ans. I never knew anything about it, and had no knowledge on the subject, and have been informed that such was the fact for the first time within the year last past.

11th. By the same. Look at the deed marked No. 841, now shown you, and state what, if anything, you were to pay said railroad company for the bond therein described over and above the amount specified in said deed, if anything.

Ans. I am not now, and never have been, under any obligation to pay anything more than is expressed in said deed for said real estate. I took said real estate by virtue of said deed and in accordance with the terms thereof, and so far as the railroad company is concerned, the deed and the records show the entire transactions concerning said real estate between us. The deed above referred to is hereto attached, and is No. 841; the only agreement I ever had respecting said real estate was the one dated about March 30th, 1858, constituting Victor A. Pepin and Michael C. Kerr, trustees for the bondholders, to bid off the real-estate mortgage, and other real estate, and the verbal agreement of partition in the fall of the same year, both of which agreements were between the bondholders, and to which the railroad company were not a party. I had a copy of the first-mentioned agreement, but delivered the same to S. Burke, my attorney in this suit.

12th. By the same. State whether the railroad company was a party to the partition of the real estate, made between the bondholders

85 in the fall of 1858. State how and between whom the partition was made, and all the facts connected therewith so far as it may effect this case.

Ans. The railroad company was not a party to that partition; the value fixed upon the property was fixed by the bondholders, simply as between themselves and to aid them in a partition of the same, and was taken by said bondholders without reference to the judgment against said company or any interest the company had in the same; the value fixed for the purposes of that partition had no reference to the real value of the property at that time, the property having been bid off at public sale some time previous thereto.

13. By the same. State what knowledge you have, or ever had, of any release by the railroad company of the original subscribers to the articles of association of said railroad company of any of the stock by them subscribed, or of any assignment thereof, or arrangement whereby the same was merged in the stock subscribed by the city, or otherwise extinguished.

Ans. I have no knowledge whatever on that subject, save some information received from S. Burke within the year last past.

I, Laertes B. Smith, a notary public within and for the county of Lorain, and State of Ohio, do hereby certify that the above-named Heman Ely was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, according to law; that the foregoing deposition by him subscribed was reduced to writing by me, and by said witness subscribed in my presence; that said deposition was taken on behalf of the plaintiffs; that the defendants did not appear by attorney or otherwise; that said deposition was taken at my office in Elyria, Lorain County, Ohio, on the 6th day of February, 1869, between the hours of 8 o'clock a. m. and 9 o'clock p. m. of said day, pursuant to the notice hereto attached.

In testimony whereof I have hereto set my hand and official seal this 6th day of February, A. D. 1869.

[SEAL.] LAERTES B. SMITH,
Notary Public.

This indenture, made this 27th day of October, 1858, between Charles Fredrick, sheriff of Floyd County, Indiana, of the first part, and Heman Ely of the second part, witnesseth:

That, whereas, on the 11th day of June, 1858, there was issued out of the F'oyd circuit court an order of sale duly certified and attested by the clerk thereof, on a judgment therein rendered on the 13th day of May, 1858, wherein Victor A. Pepin was plaintiff, and the New Albany and Sandusky City Junction Railroad Company, Thomas L. Smith, John S. Davis, James Montgomery, William M. Weir, William B. Lent, Charles B. Applegate, and John S. McDonald were defendants, in favor of said Pepin, Smith, Davis, Montgomery, Weir, Lent, Applegate, and McDonald, each in his own right and against the said railroad company, for the sum of eighteen hundred dollars each, and costs of suit; which order of sale, certified and attested as aforesaid, was directed to the sheriff of Floyd County, came to his hands on the 12th day of June, 1858, and commanded him that he cause to be sold according to law the several lots and parcels of real estate in said order of sale described, and have the moneys from such sales arising before said court, to render unto said parties respectively, to satisfy said judgment, interest, and costs of suit;

And whereas, after advertising the time and place of sale in the manner prescribed by law, the said Charles Fredrick, sheriff as aforesaid, did, by virtue of said order of sale, between the hours of 10 o'clock a. m. and 4 o'clock p. m., of this 27th day of October, 1858, at the door of the court-house of said Floyd County, after first offering the rents and properties of each and all of the several of real estate in said order of sale described for a term of years not exceeding seven, and receiving no bid therefor, then and there separately offer and sell at public auction, in fee-simple, to said Heman Ely, out-lot No. two, (2,) in the first range of out-lots in the city of New Albany, Floyd County, Indiana, for the sum of fifty dollars; also lot 12, on Lower 7th street, of John Evans' plat of lots letters "D, E, F," on Lower Water street, in said city, for the sum of five dollars; also lot No. 14, in the same plat, for the sum of five dollars; also lot 16, in the same plat, for the sum of five dollars; also lot No. 17, in the same plat, for the sum of five dollars; also lot No. 18, in the same plat, for the sum of five dollars; also lot No. 19, in the same plat, for the sum of five dollars; also lot No. 20, of the same plat, for the sum of five dollars; also lot No. 21, in the same plat, for the sum of five dollars; also lot No. 22, in the same plat, for the sum of five dollars; also No. *No.* 23, in the same plat for the sum of five dollars; also lot No. 24, in the same plat, for the sum of five dollars; also lot No. 25, for the sum of five dollars, in the same plat; also lot No. 26, in the same plat, for the sum of five dollars; also lot No. 16, on Evans street, in said plat*t*, in said city, for the sum of five dollars; also lot No. 17, in the same plat, for the sum of five dollars; also lot No. 23, in the same plat for the sum of five dollars; also lot No. 25, in the same plat, for the sum of five dollars; also lot No. 27, in the same plat, for the sum of five dollars; also lot No. 29, in the same plat, for the sum of five dollars; also the southern ten (10) feet in front and rear by 120 feet deep of lot No. 19, in the same plat, for the sum of five dollars, they being the highest and best bids respectively made therefor:

Now, therefore, to confirm unto the said Heman Ely the sale so made as aforesaid, the said Charles Fredrick, sheriff as aforesaid, in consideration of the premises and the payment of the said sums of money, in all amounting to one hundred and fifty dollars, doth, by these presents, hereby bargain, sell, and convey unto said Heman Ely the premises above described, to him and his heirs and assigns forever.

In witness whereof the said Charles Fredrick, sheriff as aforesaid, has hereunto set his hand and seal the day and year first written.

CHARLES FREDRICK, [SEAL.]
Sheriff of Floyd Co., Ind.

THE STATE OF INDIANA, *Floyd County, ss:*

Before the undersigned, a notary public of said county, this day came Charles Fredrick, sheriff of said county, and acknowledged the execution of the foregoing deed.

Witness my hand and notarial seal this 27th day of October, 1858.

[SEAL.] ROBERT M. WEIR,
Notary Public.

Here follows the evidence produced on behalf of the defendants:

The original articles of association of the New Albany and Sandusky City Railroad Company.

Not here repeated, because the same is exhibited with the answer of the defendant Thomas L. Smith, and is admitted to be a true copy.

87 Resolution of the board of directors of the New Albany and Sandusky City Railroad Company, extracted from page 21 of the book of minutes, and dated December 31st, 1853.

On motion, it was ordered that the original subscribers to the articles of association of this company be permitted, in accordance with the stipulations contained in said articles, to transfer any amount of the stock so originally subscribed by them over and above the amount of six shares or three hundred dollars to the city of New Albany, said city having made a subscription to the stock of said company to the amount of fifty thousand dollars and upwards, and that the stock thus transferred be merged in the subscription already made by said city, so that the stock of said city under her present subscription with the stock so transferred shall not exceed four hundred thousand dollars, as subscribed by her.

Resolution of the board of directors of the New Albany and Sandusky City Railroad Company, page 59 same book, and dated March 7th, 1855.

On motion it was then ordered that, if the common council ratify the subscription formerly made by the city of New Albany for eight thousand shares of the stock of this company, the calls for the payment of instalments of said stock shall not exceed two hundred and fifty thousand dollars until the road shall have been completed, and put in running order at least to its junction with the Ohio and Mississippi Railroad; and the remaining instalments shall only be called for and used for the purpose of furnishing the road with rolling-stock, depots, and the necessary machinery and appliances for running the said road or said portion of it; and that this order be communicated by the president to the common council of said city before any action is had to ratify such subscription, and it shall be irrevocable if said subscription be thereupon ratified.

Proceedings of the directors of the same company, extracted from the same book, beginning at page 82, date 8th September, 1857.

The following resolution was then presented for the consideration of the board, to wit:

Whereas the common council of the city of New Albany have passed the following ordinance, to wit:

"An ordinance to compromise and settle with the New Albany and Sandusky City Junction Railroad Company, and for the settlement of suits now pending in the Floyd circuit court, in which John Briggs and Peter Tellon are plaintiffs, and The city of New Albany and others are defendants.

"SECTION 1ST. Whereas it has been represented to the common council of the city of New Albany, by the report of the president and directors of the New Albany and Sandusky City Junction Railroad Company, issued April 30, 1857, that said company has suspended all operations upon the work of railroad; and whereas it is shown by the report of said company that they have expended all the cash and real estate which said company received for stock in said railroad company; and, furthermore, it is shown by the report of said company that they have pledged the bonds issued by the city of New Albany to said

88 company to sundry persons for sundry amounts, although the validity of said bonds is questioned, and a suit is now pending in the Floyd circuit court to test the validity of the bonds issued to said railroad company by the city of New Albany; and whereas to the common council of the city of New Albany that the said New Albany and Sandusky City Junction Railroad Company wish to compromise with the said city of New Albany, and deliver up the bonds of this city: Therefore—

"SECTION 2ND. *Be it ordained by the common council of the city of New Albany,* That Franklin Warren, mayor of said city, be, and he is hereby, authorized, empowered, and directed, in the name and on behalf of said city, to settle and compromise with the New Albany and Sandusky City Junction Railroad Company on the terms hereinafter stated.

"SECTION 3D. The New Albany and Sandusky City Junction Railroad Company shall deliver to the mayor of the city of New Albany all the bonds and coupons which the said city of New Albany issued to said railroad company, (except seven bonds now in the hands of third parties, and the coupons, which have been paid for by the city previous to the date of this ordinance,) and cancel the subscription of stock subscribed for by said city, and shall consent to the repeal of all ordinances and amendments to ordinances in conflict with the provisions of this ordinance.

"SECTION 4TH. The city of New Albany hereby agrees and binds herself, immediately after said bonds and coupons are surrendered, and the repeal of all ordinances as contemplated by the provisions of this ordinance, and on the cancelling of said railroad subscription, then, and not before, to assume and pay to the Ohio Insurance Company the sum of thirty-six thousand dollars, which said New Albany and Sandusky City Junction Railroad Company is now owing to said insurance company, which debt is now due, the same to be paid and renewed out by said city according to the rules of said company; but the first call and renewal may be paid by the city in city orders, at cash rates.

"SECTION 5TH. The city of New Albany shall assume and pay all the costs in the suits heretofore dismissed, or now pending, wherein John Briggs and Peter Tellon were and are plaintiffs, and the said city railroad and others are defendants, brought to test the validity of the tax assessed by said city for Sandusky City Junction Railroad purposes, as also the fees of the attorneys of said Tellon and Briggs, as agreed between them and their said attorneys and said city, and attorneys of said railroad company, and shall also consent that the Floyd circuit court, at its ensuing session, may, on the application of said Tellon and Briggs, enter in each case an order and decree perpetually restraining and enjoining said city, her officers, as also the said railroad company, from taking any further steps to enforce or collect any tax or taxes assessed against said Tellon and Briggs for New Albany and Sandusky City Junction Railroad purposes, and vacating and annulling all such sales of property heretofore made therefor, and the said city shall at once redeem any and all such property by the city collector sold for taxes for the purposes of said railroad, and said city shall make provision for all persons who have paid their taxes on account of said railroad.

"SECTION 6TH. The New Albany and Sandusky City Junction Railroad Company shall use all reasonable measures to make such arrangements as will eventually secure the completion of said road ac-
89 cording to the plan contemplated in the organization of said railroad company, and that said road-bed and appurtenances shall

never be used for any other than railroad purposes; and whenever any part or portion of said road is completed and put in use, the southwestern terminus thereof shall be at New Albany.

"SECTION 7TH. All ordinances and amendments to ordinances in conflict with the provisions of this ordinance be, and the same are hereby, repealed.

"SECTION 8TH. This ordinance shall take effect and be in force from and after its due publication and the due acceptance of said ordinance by the New Albany and Sandusky City Junction Railroad Company.

"F. WARREN, *Mayor.*

"I, W. W. Turley, clerk of the city of New Albany, hereby certify that the above ordinance was legally and regularly passed by the common council of the city of New Albany, August 17th, 1857.

"Witness my hand and the seal of said city this 18th day of August, 1857.

[L. S.] "W. W. TURLEY, *City Clerk.*"

Therefore, resolved, That this board, for and in behalf of the New Albany and Sandusky City Junction Railroad Company, hereby accept the proposition of said common council as far as it relates to the matters and things therein contained in relation to said railroad company, and that the president of said company be fully authorized and empowered to do and perform all the matters and things necessary to be done to *to* consummate said agreement.

On motion of V. A. Pepin, the same being seconded, the foregoing resolution was then passed by the following vote: In the affirmative—V. A. Pepin, James Pierce, John D. Rodgers, John E. Noyes, W'm B. Lent, James Montgomery, J. S. McDonald, John S. Davis; in the negative—William M. Weir.

Agreement of record.

It was admitted by the complainants, on the final hearing, that all the defendants herein mentioned in the joint answer of Thomas L. Smith and twenty-seven other defendants transferred all the stock in said New Albany and Sandusky City Junction Railroad Company subscribed by them in excess of three hundred dollars to said city of New Albany, in compliance with the condition contained in said original articles of association, and that said transfers were so made before the first day of July, 1854, and that none of said individual subscribers was ever charged on the books of said railroad company, in respect of said subscriptions, with any stock in excess of three hundred dollars. And it was further admitted by said complainants that each of said individual subscribers fully paid sum of three hundred dollars, as called for by the railroad company, long before the commencement of this suit, intending the same as a full satisfaction of all claims against them by reason of their respective subscriptions to said articles of association, and that the same was so accepted by said railroad company; and also that they had in like manner fully paid for any and all other stock in said railroad company ever at any time subscribed by them or any of them.

90 Depositions of Thomas L. Smith, James Montgomery, John S. Davis, George V. Howk, and Stephenson Burke, witnesses produced and sworn befor' me, a notary public in and for Floyd County, State of Indiana, at Kerr and Glormley's law office, No. 80 Pearl st. between Main and Market, in the city of New Albany, Floyd County, Indiana, on this 20th day of April, 1869, pursuant to the enclosed notice.

These depositions were taken on the part of the defendants in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein Heman Ely and others are plaintiffs, and the city of New Albany and others are defendants.

These depositions were taken at said law office instead of at the office of the clerk of the Floyd circuit court, as mentioned in said notice, in pursuance of the agreement of the parties to this suit, represented on the part of the plaintiffs by S. Burke, and on the part of the defendants by Smith and Kerr.

The said Thomas L. Smith, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examination by M. C. Kerr for defendants:

Question 1. State what official relations you ever sustained to the New Albany and Sandusky City Junction R'road Company.

Answer. I was one of the directors of said company; and secretary from about the time of its organization to some time in the year 1856.

Question 2. State, if you know, by whom the books of the company were kept; and whether the books indicate correctly the proceedings of the company.

Answer. I kept the minute-book or record of the acts and proceedings of said company during the time I was secretary, and the entries made during that time are, I think, in my handwriting, and contain a true statement of the proceedings of the board of directors, and copies of the various papers brought before the board. The other books, or books of account, were kept by a clerk or book-keeper; W'm H. Fogg was the first book-keeper; after him there was a Mr. Allen employed. I have no personal knowledge of the correctness of those books; but they were both competent men.

Question 3. State, if you know of any suits having been instituted by any person against the city of New Albany to test the validity of the subscription by the said city to the stock of said company, or validity of any taxes assessed by said city for the payment of the interest or principal of said subscription, and, if you know, state fully what was the market value of the bonds issued by the said city in pursuance of said subscription before the commencement of any such litigation, and how that value was effected by such litigation, and what its effects were upon the general interests of said company.

Answer. I know that after the subscription had been made, and the railroad had commenced work upon its line of road, one or more suits were commenced in the Floyd circuit court, the object of which was to have the city enjoined from the collection of any taxes for the payment of interest upon the bonds that had been issued to the railroad company for the payment of the city subscription of stock on the ground that said subscription was invalid. Before the commencement of said suits, the railroad company had endeavored to negotiate the sale of the
91 bonds that had been issued to it by said city, and had sold seven

of the bonds to William L. Pierson, one of the trustees; at what price I do not now recollect. Efforts were being made to sell the remainder of the bonds in the city of New York, and I think they could have been sold for from seventy to seventy-five cents upon the dollar; I do not think they could have been sold for more; but, before any negotiation could be effected, information was received in the city of New York of the pendency of these suits, whereby a doubt was cast upon the validity of the bonds, and they could no' be sold there or elsewhere for any price whatever, or, at least, without so ruinous a sacrifice that a sale could not be thought of. The railroad company depended upon the sale of those bonds principally for its cash means for carrying on of its work, and when it was found unable to sell those city bonds, it was compelled to discontinue its work, being utterly unable to finish any part of its railroad. It was evident that those suits could not be determined without a long litigation, and in the mean time it had no means to pay its contractors or employees. After these suits had been commenced these bonds had no market value. I do not think that if a sale of them had been enforced they would have brought twenty-five cents on the dollar.

Question 4. State as fully as you can, from your own knowledge of the condition of the railroad company after these complications arose, what were the facts and causes which led to the adjustment and compromise between the said company and city, if any were made; and, if any such were made, what their terms were, and what the considerations were upon which they were based, giving in detail the circumstances of the company and city at the time.

Answer. While the company were endeavoring to negotiate the city bonds in its hands, amounting, I think, to two hundred thousand dollars of bonds, it had borrowed various sums of money from the Ohio Insurance Company for the payment of its cash current expenses in anticipation of the sale of the bonds, and had deposited with said insurance company a quantity of those city bonds, according to my recollection, *for* eighty to a hundred bonds of a thousand dollars each, a' collateral security for the loans it had obtained. After the failure to sell the bonds, for the reason stated in my answer to the foregoing question, the Ohio Insurance Company insisted upon the payment of the loans it had made to the railroad company, and threatened to enforce a sale of the bonds that had been deposited with it as collateral security. Under these circumstances, being satisfied that at a forced sale the bonds would be sacrificed for a little or nothing, and having no other available means to pay its debts, it was thought by the directors of the railroad company to be their duty to inform the city authorities of the condition it was in, and this lead to the compromise that was effected with the city, as carried out in the ordinance passed by the city council for that purpose. It was thought at the time by all parties it was an advantageous compromise or contract for the railroad company, as the whole amount of city bonds then in the hands of the railroad company could not have been sold for as much as was paid by the city to have them taken up and cancelled. I think that the terms and conditions of the compromise were stated in the ordinance passed by the city for that purpose, and in the entries relative thereto in the record-book of the railroad company.

Question 5. State if you know whether the complainants in this action, or those under whom they claim, acquiesced in and approved or advised the adjustment that was made as you have stated, and at the time it was made, or if they had knowledge of it and of its terms.

92 (Objected to by plaintiffs' attorneys.)

Answer. I don't know that the present plaintiffs had at the time any knowledge of the compromise with the city. I think that the firm of S. & C. Howard, to whom the bonds now possessed by the plaintiffs were issued, knew of it. Those bonds were delivered to them in payment for work done upon the road.

Question 6. State if you know whether the bonds involved in this suit on the part of the complainants are the same bonds which were involved in the suit in the Floyd County circuit by Victor A. Pepin against The New Albany and Sandusky City Junction Railroad Company and others, then owned by the same parties, the complainants herein, or those under whom they now complain, and what that suit was instituted for, and who represented the holders of said bonds in that suit as their attorneys, and who then had the actual custody and possession of said bonds, and what was done with them, if anything, in connection with that suit; and if you were one of those attorneys for the complainants, state who employed you, and where and for whom.

Answer. The bonds represented by the plaintiffs in this suit are the same bonds mentioned in the answer of the trustees filed in the Pepin suit. I had been requested by the trustees generally to attend to any suits that might require an appearance by them. I think the first information I had of the Pepin suit was from Sebre Howard, one of the firm of S. & C. Howard, who told me that such a suit had been commenced, and requested me to look after the interests of the holders of certain bonds of the same description as the bonds filed by Pepin in that suit, which had been issued to S. & C. Howard in payment for work done by them, and which he had disposed of to other parties. He furnished me with a list of the holders of the bonds, and from that list I drew up the answer of the trustees, alleging that those persons held those bonds. I did not draw up answers for the seperate holders of the bonds, because I had not the bonds in possession. Some time after the judgment was rendered, towards the next spring, Mr. Heman Ely came here, bringing the bonds with him, which he delivered to me to be filed in the suit, and I so filed them.

TUESDAY, 4 *o'clock p. m.*

The further taking of depositions herein is adjourned until 9 o'clock to-morrow morning.

TUESDAY, *April 21st*, 1869—9 *o'clock a. m.*

Examination of Thomas L. Smith continued:

Answer continued. The bonds filed in that suit were those known as real-estate bonds. The answer was filed by Smith & Kerr, the law firm of which I was then a member.

Question 7. When Heman Ely brought the bonds to New Albany to be filed, as you have stated, did he know of the compromise with the city?

(Objected to by the plaintiffs' attorney.)

Answer. I think he was informed of the compromise with the city. He said he came for the purpose of making a thorough examination into the affairs of the railroad company, and of the facts connected with the judgment; and I think he did. The fact of the compromise was then publicly known; there was no idea of keeping it secret by anybody. All the matters connected with the railroad company were

93 talked over with him by the directors, and though I cannot certainly say that that subject was mentioned, I am quite confident it was.

Question 8. When did you first hear of any question being made as to the validity of the compromise with the city, and the cancellation of its subscription for stock?

Ans. Never, until about the time of the commencement of the present suit, or during the trial of what was called the "Lindley suit," in the Floyd circuit court in January or February in 1868.

Question 9. Did you continue to act as attorney for the parties represented by you in the Pepin suit after Mr. Ely brought the bonds to be filed; and, if so, how long, and for what purposes?

Answer. The firm of Smith and Kerr, of which I was a member, continued to act as attorneys for those parties up to and during the time of the Lindley suit.

Question 10. Did you receive any compensation for such services; and, if so, by whom was it paid?

Answer. There was an agreement with Mr. Ely that the firm of Smith and Kerr was to receive two hundred dollars. This agreement was made shortly after the judgment in the Pepin case. It was for our services in that case. I cannot say whether it was paid or not.

Question 11. Did you appear for any of the parties in what is called the Lindley suit; and, if so, by what authority?

Answer. When that suit was commenced, without any specific directions, but under our general employment as attorneys for the trustees of the real-estate mortgage, and those parties mentioned in the answer of the trustees in the Pepin suit, the firm of Smith and Kerr filed answers for them in the Lindley suit.

Question 12. Do you know of any verbal agreement as to the issues in that suit during its trial; and, if so, what was it, giving all the circumstances?

(Objected to by plaintiffs' attorney.)

Answer. After the issues had been joined in that suit, and shortly before the trial, Mr. Burke came to this place to represent the parties for whom we had filed answers, except the trustees and myself, having purchased, as he said, the interest of some of those parties. A difference of opinion arose between him and myself as to the proper course to be pursued upon the trial, he proposing to join with the plaintiffs and file his bonds, asking the same relief as the plaintiffs, or something to that effect. I told him if that was done I should withdraw from the case, so far as the parties represented by him were concerned, and leave him to manage it in his own way. It was finally agreed, however, as I understood, that we should go to trial upon the issues made upon the pleadings we had already filed. We did, accordingly, go into the trial, and commenced the trial upon those issues, but during the progress of the trial, unexpectedly to me, Mr. Burke offered and filed the paper filed by him during that trial with the bonds, claiming a judgment upon them. I then proposed to leave the case, so far as the parties represented by him were concerned, and withdraw all the pleadings I had filed for them. Mr. Burke objected to that, and said he would hold me responsible for damages if I did so. I then asked the court for time to file an answer, upon my own behalf, to the complaint filed by him. Several attorneys, representing other parties, asked for time for the same purpose. It was then agreed in open court by Mr. Burke, myself, and the other attorneys, in order to save time, that the several defendants in the suit should be permitted to give in evi-
94 dence any matters that could have been given under any answers that might be filed to his complaint.

(Answer objected to by plaintiffs' attorney.)

Question 13. What was the condition of the railroad company as to debts and liabilities at the time the compromise was made with the city?

Answer. I think the company owed no debts except those due the Ohio Insurance Company, those due the Howards upon their contracts for work, and the real-estate bonds.

Question 14. State whether, in the adjustment that was made of those matters between the city and the company, there was any intention on the part of any of the parties to that adjustment to hinder, delay, or defraud the creditors of said company or city.

Answer. I think there was not. It was then supposed by all the parties that that adjustment would enable the railroad company to pay off all its liabilities, and that the city was the greater loser.

Question 15. What was the value of the real estate mortgaged to secure the bonds called real-estate bonds at the time that mortgage was made?

(Objected to by plaintiffs' attorney.)

Answer. I have here the mortgage which I file, marked "No. 1," with a list of the property contained in it, and an appraisement by V. A. Pepin, Samuel H. Owen, and Augustus Bradley, sworn to by them, making the value of the whole property $154,855. I can only say they were very respectable men and good judges of property. Mr. Owen was recorder of the county, and Mr. Bradley auditor.

(Answer objected to by plaintiffs' attorney.)

Question 16. Was that value afterwards materially changed? and, if so, state if you know by what causes.

Answer. I think it was changed very materially: First, from the failure of the railroad company to complete its railroad; and, secondly, because about the year 1857, in consequence of the money market about that time, the value of property of all kinds in this place was greatly reduced.

Question 17. What was the number and the value of the real-estate bonds issued by the railroad company?

Answer. One hundred and ten bonds of one thousand dollars each.

Question 18. Were any of those bonds sold for money; and, if so, for what price?

(Objected to by plaintiffs' attorney.)

Answer. None of them were sold for money by the railroad company. The company tried to sell them, but could not.

Question 19. Was there any contract made by the parties to the Pepin suit after the judgment was rendered; and, if so, what?

Answer. There was a contract. I have not a copy now; there is one attached to my deposition, taken for the plaintiffs in this case, and I think a copy is also found in the record in the Lindley case.

Question 20. Were there any modifications afterwards made by the parties to that contract; and, if so, what?

Answer. It was afterwards modified in some respects. At the time that contract was made it was contemplated that all the property mentioned in both mortgages therein mentioned should be brought in by Pepin and Kerr at the sales under the judgments, and afterwards sold by them, and the proceeds divided. Afterwards it was thought better by the parties to divide the property thus brought in instead of
95 making a sale of it; and, for some reasons which I do not now recollect, the property sold under the judgment of sale rendered on the second mortgage was bid in, I think, by Mr. Ely *on* in his own name, instead of by Pepin and Kerr.

Question 21. What amount of property did the parties who are plaintiffs in this suit, or those under whom they claim, receive under that contract and its modifications, and how was it apportioned to them?

Answer. After the property covered by both mortgages had all been bid off at the sales under the decrees of foreclosure, the parties who had signed the contract above referred to all got together and made a voluntary agreement to partition the property among themselves according to their several interests. A schedule was drawn up of this property for the purpose of making such partition, and was used in making it. This schedule I now file, marked No. 2. It shows the property set off to each of the parties, and the prices at which it was agreed to be taken; and the partition thus made was afterwards carried into effect by amicable proceedings in the Floyd circuit court, of which a record is contained, I think, in the Lindley suit. The property received by the parties to this suit, or those under whom they claim, as represented by Mr. Ely at that time, amounts, if I have added up the figures correctly, to $26,998, at the prices at which it was agreed to be taken by him. The names and amounts opposite the description of property show by whom each piece of property was taken, and at what prices.

Question 22. The paper marked "No. 2," to which you have referred, has the property arranged under two heads. Explain what is meant by that property under the head "Schedule of property covered by second mortgage."

(Objected to by plaintiffs' attorney.)

Answer. The property under the head "Schedule of property covered by original mortgage" is the property mortgaged to Pierson and Seymour to secure the holders of real-estate bonds; and the property mentioned in the "Schedule of property covered by second mortgage" is the property that was mortgaged to Davis, McDonald, and others, and referred to in the contract before mentioned.

Question 23. By whom was that property bid off at the time of the sale under the decree of foreclosure, and at what prices?

Answer. I think it was bid off by Mr. Ely, but the prices at which they were bid off I do not now recollect; but I think they were merely nominal.

(Both question and answer objected to by plaintiff's attorney.)

Question 24. State, if you know, the reason why that property was suffered to be bid off as such merely nominal prices.

Answer. It must have been because it was well understood by all the parties to the contract, as well as by the officers of the railroad company, that the property thus bid off was to be thrown into a general fund, as provided by the written contract, and appropriated at its value to the payment of the demands of the several parties in whos' favor the decree had been rendered in the Pepin suit. I know, neither the other parties to that contract nor any officer of the railroad company would have permitted the property to be bid off at such prices but for that understanding, those prices being entirely inconsistant with the value of the property.

(Both question and answer objected to by plaintiffs' attorney.)

Question 25. Who was present at the time of the agreement, if any was made, for the partition of the real estate referred to, and how was the value thereof ascertained and fixed by the parties?

96 Answer. I think all the parties were present and agreeing to the partition at the prices mentioned in the schedule marked No. 2, including both the schedules of the original and second mortgage property. The property included in both those mortgages was treated

as belonging to the common fund, as provided in the contract. I do not now recollect the precise manner in which the prices were fixed but I am under the impression that the prices were fixed in the first instance so as to cover about fifty per cent. of the amount of the bonds, any of the parties having the right to overbid that amount on any particular piece of the property, and to take it at the amount of the highest bid. When there was no higher bid the several pieces of property were set off to the persons who were willing to take them to the amount of their interests in the decree at the prices fixed.

Question 26. How did it happen that so large a portion of that real estate was so apportioned to Mr. Ely?

Answer. Mr. Ely had a power of attorney from the other parties mentioned in the answer of Pierson and Seymour in the Pepin suit, authorizing him to act in their behalf, and he requested all the portions of said property which would fall to them to be partitioned in his name, because, as he said, it was contemplated to sell the property, and it would be inconvenient to have so many parties to the deeds.

Question 27. Do you know whether the parties so represented by him afterwards assented to this appointment and division?

Answer. I only know that I never heard of any objections by them. Our firm (of Smith and Kerr) had charge of the property partitioned to him for a good many years—collecting rents, and paying the taxes, and making settlements with him; and I think a portion of the property was afterwards set off by Mr. Ely to Mr. Putnam as his share, he being one of the persons represented by Mr. Ely.

Question 28. For how much of the capital stock of said railroad company did you subscribe; and for how much, if any, did you pay; and what did you do with any part for which you did not pay?

Answer. I subscribed to the articles of association, I think, five thousand dollars; afterwards, in accordance with the provisions of said articles, I transferred all of it but three hundred dollars to the city of New Albany; after the provision was made for the subscribers to the articles of association to transfer their stock (except three hundred for each) to the city of New Albany, and such transfers were made, a number of the subscribers to the said articles subscribed an additional amount of stock for the purpose of raising the amount of capital stock to as large a sum as they could. I subscribed an additional one thousand dollars, making the amount of my retained stock, in all, thirteen hundred dollars of cash subscriptions, which I paid in full, as I think the books will show. I also subscribed some stock to be paid for in real estate, which was so paid for, and I now hold no stock that was not fully paid out.

Question 29. At what time did you so transfer the forty-seven hundred dollars of your first five-thousand-dollar subscription to the articles of association, as you have stated?

Answer. I cannot remember the precise date, but I think it was soon after the order was made by the board of directors to permit the transfer; that order was dated December 31, 1853. I transferred it before any contracts were made for the construction of the railroad, or any expenses were incurred except for surveys. There was a transfer-book kept by the company, showing the dates and forms of the transfers, and I have searched for that book and cannot find it in any place to which I have access where it is likely to be. I do not know where it is.

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Question 30. Did the authorities of the city of New Albany know of

the stock being so transferred to said city by individuals in reduction of their individual subscriptions to three hundred dollars each?

(Objected to by plaintiffs' att'y.)

Answer. I think they did. Mr. Joseph A. Moffett was then mayor of the city, and he was also a member of the board of directors of the railroad company, and he was present at the making of the order by the directors, dated December 31, 1853. I think one or more other members of the board of directors were also members of the city council.

(Answer objected to by plaintiffs.)

Question 31. What do you know, if anything, of the reduction of their stock by other subscribers, by transfers in like manner, under the provisions of the articles of association?

Answer. I know that some other transfers were made, but I cannot say by whom or when, but I think it was generally understood that all the subscribers to the original articles of association had so reduced their stock, and think they were never charged for more than three hundred dollars on the book of the company, on their original subscription.

Question 32. Do you know of any other subscriptions to the capital stock of the railroad company besides those made by the subscribers to the articles of association; and if so, what.

Answer. I think Sebra and Charles Howard, the contractors to build the road, were subscribers for stock to an amount I do not now personally recollect. I had forgotten the fact until a few days ago, when, looking over the record of the proceeding and acts of the board of directors, I found upon page 77 a proposition made by the Howards for a settlement of their claims against the company, one of the conditions of which was the cancellation of their subscription for stock, and, upon looking upon the stock-ledger of the railroad company, at page 165, I find them credited with six thousand one hundred and thirty-one shares, amounting to three hundred and six thousand five hundred and fifty dollars, which I suppose is the amount of stock subscribed by them. There are other parcels of stock credited to them in the account, which are doubtless stock that was paid to them in part payment for work done under their contract, that contract providing for part payment in stock.

Question 33. Do you know whether that stock subscription by the Howards was ever paid or not; and if it was, how was it paid?

Answer. I don't know whether any of it was ever paid or not; but that amount could not have been paid, or any considerable portion of it, because it would have amounted, with what other payments were made to them, to a good deal more than the company owed them, they having had the contract for all the work and materials on the whole line of the road, all the material payments being made to them.

Cross-examination by Mr. Burke for plaintiffs:

Question No. one. How many times did you ever see Heman Ely?

Answer. I think I saw him two or three times; once when, in spring of 1858, he bro't bonds down to file; and again, when partition was agreed upon. I may have seen him at other times, but don't recollect. I don't know I saw him any other time; may have done so; can't say.

98 Question 2. Do you remember that you told him, when here, to file the bonds of the compromise between the city and the railroad company; that is, have you now a distinct recollection of speaking

to him on that subject? If so, give as near as you can the words you used.

Answer. I have not a distinct recollection at this length of time that I did inform him of the compromise; but my impression is that he was informed of it by some person while here My impression is rather a deduction from the general conversation upon subject.

Question 3. Did you, as attorney for Mr. Ely, at any time, inform him that the compromise between the city and railroad was invalid as to the creditors or any one else?

Answer. I am confident I never did; I don't think the subject was ever mentioned; I never thought, and don't think yet, that it was invalid.

Question 4. Do you know of Mr. Ely having at that time any other attorney in Indiana than your firm?

Answer. I do not.

Question 5. You have said in your direct examination that you filed the answers in the Lindley case for the trustees Pierson and Seymour, and for Ely and other bondholders, who furnished you the facts set up in those answers. Did you not file them from your own knowledge of what had previously taken place in connection with the business?

Answer. I filed the answers from my own knowledge of the facts; I don't know that I had any information of the facts from anybody, except as shown by the papers in relation thereto.

Question 6th. Were you the holder of any of the real-estate bonds which were put into judgment in the Pepin case; if so, how many?

Answer. I was the holder of some of the bonds; I think five.

Question (by the same) 7th. State from whom, under what circumstances, and upon what consideration you received those bonds?

Answer. I received them from the railroad company. They were delivered to me by the president of the company in consideration of the payment of a debt of the railroad company for which I was a surety, and which I was obliged to pay, it having been found impossible to sell the bonds for the payment of the debt, and the company having no other means by which I could be reimbursed for the payment of the debt. The debt I paid was about $2,200. There is an entry on the record-book of the R. R. Co., at page 80, showing the amount of the debt, and that there was delivered to me five real-estate bonds and five city bonds as security for the payment of this debt; but afterwards, upon the compromise with the city, it was necessary to take up the city bonds for the purpose of delivering them to the city, and I gave up these bonds for that purpose. Then, as the real-estate bonds were considered insufficient to pay the debt, a mortgage was executed to the parties who had assumed that debt as a further security, which mortgage is the one spoken of heretofore in this deposition as the second mortgage. The property specified in that mortgage was thrown into the general fund for the payment of all the real-estate bonds which had been issued, or provided for in the contract before spoken of. The entry of this second mortgage will be found in the record-book of the R. R. Co., at page 87.

By same, question 8. Was the price fixed upon the property at the time of the partition its true cash value, or was it simply a price fixed for convenience in making the partition without regard to its actual cash value?

99 Answer. The price fixed, I think, was the price at which the parties agreed to take it. The price was, I think, in some instances, more than the actual cash value. I will state here that the

item set off to T. L. Smith at $5,000 00 was intended to be set off to T. L. Smith and W'm M. Weir, to cover both their claims under the decree n the Pepin case, and was so partitioned in the partition case, I receiving only the undivided half of the north half of lot No. 8, on State street.

Question 9. Who owned this property at the time of the partition?

Answer. It had been bid off for the benefit of the parties who held the bonds that were in judgment in the Pepin suit. It was partitioned among them as their property.

Question 10, by the same. Did you, as attorney for Mr. Ely, or any of the creditors of the railroad company represented by him in the division of the property, make any agreement with the railroad company to credit the company with anything more upon the judgments against it than the property was sold for by the sheriff or master commissioner; if yea, upon what authority did you make such contract?

Answer. I made no agreement on the subject. At the time the contract was made Mr. Ely was here himself, acting for himself and those he represented, and also at the time of the division of the property.

Question 11, by same. To what contract do you refer as having been made by Ely?

Answer. I refer to the written contract made by the parties interested in the Pepin suit, and attached to my deposition taken by the plaintiffs in this case. I don't know of any other contract made upon that subject.

12. Question by the same. Did you inform Mr. Ely, at any time, the terms upon which you and the other directors of the railroad company held the real-estate bonds held by you and them; if yea, when and where, and what did you inform him the terms were?

Answer. I think he was informed at the time the contract above referred to was made, by myself or somebody in my presence, and that was the reason why the property covered by the second mortgage was thrown into the general fund for the benefit of all the holders of the real-estate bonds. The mortgagees named in the second mortgage, not desiring to take any advantage of the fact that that mortgage was made to them separately, the property covered by that mortgage was not covered by the original mortgage to Pierson and Seymour as trustees.

Question 13. Am I to understand you that the property in both mortgages was thrown into a general fund and divided between the creditors without regard to whether it was in first or second mortgage?

Answer. Certainly. The schedule marked "No. 2," made for the purpose of apportionment, shows that fact.

Question 14. Did you or any one else inform Mr. Ely that you held the real-estate bonds as security for the amount which you had assumed to pay for the company, as shown by the record?

Answer. I don't know that the record was shown to Mr. Ely, but I think he was informed substantially of the facts as shown by it.

Question 15. Do you know of any reason why, in the division of the property, Ely got about $9,000 00 worth, as shown by the schedule of the property embraced in the 2d mortgage, while all other parties got but $1,460 00 worth?

Answer. I know of no other reason except that he selected it himself at the prices fixed, or chose to take it at those prices.

Question 16. Was not his proportion of the property received
100 under the first mortgage diminished in proportion to the amount he took of property embraced in the 2d mortgage?

Answer. I suppose it was; the whol' property being thrown into one

fund and divided out as if there was only one mortgage in favor of all the holders of the real-estate bonds.

Question 17. How much did the railroad company owe the Ohio Insurance Company in all, in August, 1857, at the time of the compromise with the city?

Answer. I do not know the exact amount.

Question 18. What means had the company left to pay its debts after the compromise was made with the city?

Answer. I cannot now state the exact means. I know that it had no means of any considerable amount.

Question by the same. Don't you know the suit bro't by Pepin to foreclose the real-estate mortgage was pending at the time of the compromise, and that judgment was finally rendered in that case in the fall of 1857 against the city and in favor of the bondholders for about $119,000 00, and that the company had no means sufficient to pay one-half the judgment?

Answer. I cannot now say, except from the dates of the compromise and of the time the suit was brought, as shown by the record. The amount of the judgment will also be shown by the record. I don't know that the railroad company had property sufficient to satisfy that amount.

Question 20. Did you not, as att'y for one Farrel, about that time, take a judgment against the railroad company for about $3,000, which you were unable to collect because of the insolvency of the company?

Answer. I cannot now recollect; possibly I may have.

Question 21. You have said you did not yet doubt the validity of the compromise between the city and railroad company; when did you first have doubt about the validity of the city subscription?

Answer. I decline to give any opinion upon that subject.

Question (by the same) 22. Were you present at the trial of the Lindly case, before Judge Jewett?

Answer. Yes; I was present most of the time.

Question 23. Did you, during that trial, hear the question made or debated whether the real-estate bondholders received the real estate embraced in the mortgage in full payment and satisfaction of their claims? Did you hear any evidence upon that subject upon that trial?

Answer. I cannot say that I did hear the question made or debated whether the real-estate bondholders received the real estate embraced in the mortgage in full payment or satisfaction of their claims, but I do not now recollect all the questions that were made or debated on that trial. The evidence given was very voluminous, and I cannot say whether any evidence was given bearing upon that subject or not.

Question (by same) 24. Did not Judge Jewett rule out the evidence offered by you to show a judgment taken by Pepin and others against the company at first, and then, without deciding at the time as to the admissibility of the evidence, receive your evidence and most other evidence subject ions, so that when the trial closed counsel wer' not advised of what evidence he considered in or out?

Answer. In the first instance he did rule out the record which I offered, showing the judgment in the Pepin case, but afterwards expressed a don't as to the correctness of that ruling, and received the evidence subject to objection. As to the balance of the question I am not able to give a definite answer.

101 Question 25. Did you have any conversation with Judge Jewett, after the oral argument closed in the Lindley case and before he announced his decision, as to his decision or what it was to be?

Answer. I may have had some talk with him, but I don't think he in-

formed me as to what his decision would be, though he may possibly have done so before it was formally announced; but I am certain he did not inform me of any reasons for the decision, nor were any talked about between him and me.

Question 26. Were you informed by Judge Jewett or George V. Howk, esq., before Judge Jewett formally announced his decision in that case, that he would find that the real estate was taken in full payment and satisfaction of the bonds and mortgage?

(Objected to by defendants' attorney.)

Answer. I cannot now say whether I was or was not so informed.

Question 27. When so informed, did you not ask, "Is there any evidence on which to base such a finding?"

Answer. As I have already stated, I don't know that I was so informed; I cannot say that I asked such a question.

Question 28. State between whom the agreement was made of which you speak, on the Lindley trial, and what was said by each party to the agreement at the time?

Answer. I have stated before that I asked time to file an answer to the complaint, embracing bonds filed by Mr. Burke, on my own account as one of the defendants; other attorneys representing other defendants asked for time for the same purpose, and Mr. Burke then stated that, rather than have the trial interrupted for that purpose, he would agree that the defendants should give in evidence any matter that could be given under any proper form of pleas that could be filed by them. This was the agreement, as I understood it, made in open court in the hearing of the judge.

Question 29. Instead of the facts being as above stated, is it not true that after I filed the additional answers that you objected and demanded time as above stated; and that, finally, as the court held that I could offer the bonds under the petition or complaint of pl'ff, *that* I withdrew the answers, and the judge struck out the leave to file them, so that no leave to file answers appears of record?

Answer. There was a good deal said upon the subject, I think, at the time, but I am confident that Mr. Burke did agree that evidence should be given as I have stated, and that we continued the trial under that agreement; I do not recollect whether the leave to file that paper was struck out or not, but I think that either that paper or some one in lieu of it was continued on file in the case.

Question 30. Did you not continue the trial because I withdrew the answers and the court held you must do so?

Answer. I think not.

Question 31. Do you mean to say that you agreed to any proposition made by me, after I offered the bonds on that trial?

Answer. I mean to say that we went on with the trial in consequence of the agreement which I have stated; I don't know that there was any other proposition or agreement made.

(Question repeated.)

Answer. I mean to say that we went on with the trial in consequence of the agreement which I have stated; I don't know that there was any other proposition or agreement made.

102 Re-examined by defendants' attorney:

Question 34. You have stated, in answer to the 9th cross-interrogatory of the plaintiffs' attorney, that the property was partitioned among the creditors who obtained judgment in the Pepin suit, as their property; was the amount of the bids made at the sale by the

sheriff or commissioner regarded as any criterion of the value of the property for the purpose of making partition among themselves?

(Objected to by plaintiffs' attorney.)

Answer. No; quite the contrary. It had been understood that Pepin and Kerr was to bid off the property whenever any pieces of property were not bid up to what was considered a fair value by outside bidders, it being authenticated that, at a sheriff's or commissioner's sale of so large an amount of that kind of property at that time, there would be great sacrifices without some such arrangement, and that the property should afterwards be sold at fair prices by Pepin and Kerr, and the proceeds applied to the payment of the judgment, according to the terms of the written contract before referred to. It was my understanding that the property was not bid off by them, except when it was not bid off by other parties at fair prices. And afterwards, when it was agreed to divide the property instead of waiting until it was sold by Pepin and Kerr, it was to be apportioned and partitioned and applied to the payment of the judgments, at its fair value.

Question 35. You have said in answer to several questions that, about the time of the compromise with the city and afterwards, the railroad company had no considerable amount of property. What do you mean by property in that connection?

Answer. I mean property subject to execution or immediately available. There may have been equitable assets, such as unpaid subscriptions of stock.

Question 36. Had the fact that you received the five bonds held by you for the consideration and in the manner stated by you anything to do with or any effect upon your actions relative to the contract or to the bidding in of the property by Pepin and Kerr, or by Mr. Ely, or in his name?

Answer. Not the slightest, except as I have before stated, in the throwing in the property under the second mortgage for general distribution among the creditors. As to the property bid off to Mr. Ely or in his name, I had no knowledge that it was to be so bid off, or for what reason, or at whose suggestion—certainly not at mine—nor have I any idea how that fact could effect my rights or interests in any way whatever.

Question 37. Did you, directly or indirectly, receive any other compensation for the debt you paid for the railroad company except the property you received on the partition under the contract?

Answer. No; no other whatever.

Question 38. Was that property received by you worth more or less than the debt paid by you?

Answer. It was worth less; I should have been glad to have found any one to take it off my hands upon payment of the debt by him.

Question 39. You have said, in answer to the 8th cross-interrogatory by the plaintiffs attorney, that some of the pieces of property specified in the schedule were apportioned at prices higher than the cash value. Do you mean that all the property was thus overvalued or appraised too high?

Answer. No; I do not mean so; I do not consider myself a very
103 competent judge of the value of real property. It may have been a fair average value at that time.

Re-cross examination:

Question 1. Look at the answer filed in the Lindley case, October 28, 1863, by Putman, Ely, and others, and signed Smith and Kerr, and say in whose handwriting it is.

Answer. It is in my handwriting.

Question 2. You say the property received by you in the partition was not worth what it cost you, or the amount of your debt. How did the property set off to you compare with that set off to Ely in proportion to your judgments?

Answer. I cannot say; I do not know what the value of the property set off to Mr. Ely was.

Question 3. Did you not aim to make an equal partition of the property between the holders of judgments in proportion to the amount of each?

Answer. I did not participate in fixing the value of the property; I suppose and believe that was the intention.

Question 4. What written agreement do you allude to in your answer to defendants' 34th question in the commencement and close of said answer?

Answer. I mean the same written contract that I have referred to before, and that is attached to my deposition previously taken by the plaintiffs in this case.

Question 6th. Do you know of any other agreement in writing, made by Ely upon that subject?

Answer. I do not know of any other agreement in writing.

Question 7. Do you know of any other agreement by Mr. Ely upon the subject of any kind; and if so, when and where was it made, and between whom, and what was said by each party to it when it was made?

Answer. I do not know of any other agreement, except modifications afterwards made of the written contract, among which was the agreement that the property should be divided instead of remaining in the hands of Pepin and Kerr to be sold; and it was certainly my understanding that at the time of the agreement for partition, Mr. Ely and all the other parties being present, it was a part of that agreement that the property should be taken at the prices affixed to the schedule marked No. 2, and applied to the payment of their several judgments at those prices.

Question 8. What was to be done with the amount that the commissioner returned the property as sold for; was the property to be credited twice, or only once, on the judgments?

Answer. I can only say that the return of the commissioner was not regarded as a return of the value of the property sold. I do not know whether there was any credit made upon the judgment or not, but it was my understanding that the property was to be applied to the payment of the judgment at the prices fixed. The value of the property was to be credited upon the judgment but once, but that application was to be made according to the terms of the written contract under which the property was to be sold by Pepin and Kerr. I may possibly be mistaken as to the fact that it was to be credited upon the judgment, not having the contract before me. I will add to that that the partition of the property was to be intended as a substitute for the sale by Pepin and Kerr.

Question 9. When you drew the answer above named, in the
104 Lindley case, in 1863, and had the contract before you, was not your recollection of what was to be applied upon the judgment and the history of the case as clear in your mind as now; and did you not aim to set up the facts in that answer correctly?

Answer. My recollection of the case was as clear then as now, and I

aimed to set up the facts of the case as far as was necessary and advantageous in the defense of that suit.

Question. 9. Was the judgment in your favor in the Pepin case more or less than the company owed you; if more, how much?

Answer. The record shows how much the judgment was, and the debt was as I have previously stated.

Question 10. State whether all the mortgagees in the second mortgage, so called, of October 20, 1857, were not directors of the railroad co.?

Answer. I think they were all directors but Applegate.

Question 11. How did it happen that yourself and others, directors holding real-estate railroad bonds, took a judgment for the whole amount due upon the bonds, including coupons, in the Pepin case; and afterwards, at the May term 1858, when the mortgage to you and others, given to secure the same debt, was foreclosed, you took a judgment for only about $1,800 00 each?

Answer. The records in the two cases show the grounds upon which the judgments were rendered in each. I think I have already explained fully the nature of the whole transaction; that the second mortgage was an additional security for the debt which had been paid by the mortgagees. It was never expected, under either or both judgments, that the mortgagees named in the second mortgage would secure or retain more than the amount of the debt which had been paid by them.

Question 12. If you never expected to secure or retain more than was paid by you, how did it happen that you took a judgment against the company for more than twice that amount, and in the agreement making Pepin and Kerr trustees provided that Ely and others should not share in the proceeds of the 2d mortgage until you had received $2,500 00 each, an amount much greater than was due you?

Answer. I don't think that the sum of $2,500 00 was more than the amount of the debt and interest. I further think the contract made between all the parties to the judgment and Mr. Ely was made when he had full knowledge of all the facts.

Question 13. Have you any further explanation to give in answer to the above question?

Answer. No; excepting that we had been at considerable trouble and some expense in connection with all the matters, and if we should, under the provisions of the contract, have received any small amount over and above the amount of the debt and interest, which I do not know that we should, as I have not calculated the amount, it would have been no more than a fair compensation for such trouble and expense, and we never did receive any more than the amount of the debt, nor as much.

Question 14. Was not the judgment taken on the second mortgage, in favor of yourself and others, taken for the true amount due you?

Answer. I don't recollect what the amount of the judgment was. I have already stated the amount of debt, as shown by the record of the railroad company, was $2,200; but I think there is a mistake in that statement upon the record book; the debt I actually paid was, I think, $2,260 00. I know it was more than $2,200 00.

Question 15. The schedule produced by you here, said to be used
105 at the division of the property, and called schedule No. 2, shows that there was set off to you and Wier, $5,250 00 of property; if you paid $2,260 00, and Weir the same, that would only make $4,520 00

for both; how do you make out that you did not get more than your due from the company in view of these facts.

Answer. Only because, if there is that difference in the amounts, we did not consider the property worth as much, and in fact it was not worth as much as it is appraised at in the schedule.

Question 16. Have you not testified in this case that each party in that partition took the property at its aforesaid value, and that you supposed that to be the true value?

Answer. What I have testified is already in the record and will show for itself. I will here state, however, that there was no partnership connection between myself and Weir; but the property was partitioned and set off to each separately, for the payment of separate debts.

Question 17. How did it happen, then, that there was more than $5,000 of that property set off to you individually?

Answer. It was not set off to me individually; the names upon the schedule were merely a memorandum made at the time for the basis of a subsequent partition. My name was put to that item with the understanding that it was to be divided equally between myself and Weir; and in a subsequent decree for partition, made pursuant to the agreement at the time that schedule was made, it was so divided, I receiving one undivided half of that item of property, and Weir the other.

Question 18. Will you now say, upon reflection, that each party to that partition was to take the property set off to him, and valued in the schedule at the value therein fixed, and credit the company with the amount therein fixed upon their judgments?

Answer. I don't think I have said that the judgments were to be credited with the amount of the property, as specified in that schedule, but that the apportionment of the property under that schedule was to be in lieu of the sale of it by Pepin and Kerr, according to the contract, and applied in the same manner that the proceeds of the sales would, if the sales had been made; but I think the officers of the railroad company were cognizant of the arrangement that the property was to be bid in by Pepin and Kerr, and would not have permitted a large portion of that property, especially that portion sold under the second mortgage, to have been bid off at such notoriously insufficient prices, except upon the expectation that it was to be applied to the payment of the judgment at its fair value.

Question 19. Will you now have the kindness to answer the last question put to you directly?

Answer. If I have not sufficiently answered it I will. I do not say so, and have not said so.

Question 20. Have you ever, as one of the parties to that division, credited the company upon any record or judgment with the amount of property received by you; if so, when and where?

Answer. I don't think I have credited any records with the amount of property received by me.

Question 21. Have you ever paid over to the company the difference between the property received by you as fixed in the schedule and the amount due you from the company; if not, why not?

Answer. I have not paid over any such difference. No such demand was made upon me, and the property received by me was worth less in reality than the debt paid by me.

Question 22. Was not all the property embraced in the first mort-
106 gage sold before the written contract above named was made, and did not such property sell at as near its true value as property of the same kind sold at public sales usually does?

Answer. I do not recollect whether the property was sold before the contract was made or not. As I have already said, I do not consider myself a very competent judge of the value of such property, or what it ought to have sold for in the market at that time, but I am under the general impression that the property sold under that mortgage was bid in at as fair prices as such property would then usually sell for at sheriff's sales.

Question 23. Did not you and the other directors of the railroad taking judgments in the Pepin case, when you foreclosed the 2nd mortgage, credit the railroad company with the amount made for you severally by the sale of the property in the first mortgage, and thereby reduce your debt several hundred dollars each?

Answer. I do not now remember; it may probably be the case; I cannot say.

Question 24. What officers of the railroad company do you allude to as having been cognizant of the contract between *between* the creditors making Pepin and Kerr trustees?

Answer. I mean the president and directors, of course.

Question 25. Was not the president and all of the directors of the company that knew about it *about it* parties to it as bondholders and creditors of the company?

Answer. The records of the railroad company and the various proceedings of the company will show the facts as to that matter.

The examination being now concluded, the witness desires to make the following explanations:

I have stated in my answer to the 25th question that I am under the impression that the prices of the property were fixed in the first instance so as to cover about fifty per cent. of the value of the property. I did not get this impression from any knowledge I had at the time, as I have no recollection of being present when the prices were fixed, but from hearsay information solely, long after the time when the schedule was made. I. therefore, request this part of that answer to be stricken out. And, since making my answers as well to the questions in the direct examination as to those in the cross-examination of the plaintiff relative to an agreement on the trial of the Lindley case, as to the admission of evidence, after careful reflection, I desire to add the following statement: I think a paper in the nature of a complaint setting out the bonds claimed by him and his clients was filed by Mr. Burke and afterwards withdrawn, and another and shorter paper, which, however, I regarded as of the same nature, filed in its place. It may have been before the first paper was withdrawn that myself and others demanded time to answer it, and that the proposition of Mr. Burke that evidence should be admitted without such answers was made. I will further state that since the trial I have heard others state that such an agreement was made, and it is possible such statements may have produced an impression on my mind which I have confounded with my recollection of what occurred at the time of the trial, but my best impression still is that an agreement was made as I have stated, and that it was regarded as in force during the subsequent part of the trial. I further state, by consent of the plaintiffs' attorney, without a question being put to me on the subject, that the transfer made by myself and others of all the
107 stock originally subscribed by us to the articles of association except six shares, was treated and regarded by said railroad company as a valid transfer, and that said railroad company accepted said subscription by said city in full satisfaction and discharge of all liabilities of the individual stockholders making such transfer, except to the

six shares or three hundred dollars of stock so retained by each of them.

THOMAS L. SMITH.

(Question and answer objected to on the ground of irrelevancy and incompetency.)

THURSDAY, *April 22d*, 1869.

The said James Montgomery, second witness, being duly sworn to testify the truth, the whole truth, and nothing but the truth relative to said cause, deposes as follows:

Question 1. State your relations to the New Albany and Sandusky City Junction Railroad Company now and heretofore.

Answer. I was made a director at the time of the organization of the company, and some time afterwards was elected president, and I have had no successor. I acted as director and president of the company during its active existence.

Question 2. State if you were a subscriber to the original articles of association, and, if so, to what amount, and what did you do with your stock.

Answer. I was a subscriber to the original articles of association to the amount of $2,500, and transferred all to the city, except $300 00, which I paid to the company. I made that transfer in pursuance of the conditions contained in the articles of association.

Question 3. State if you have personal knowledge that any other persons became subscribers to the original articles of association; and, if so, who they were, and what they did with their stock, as far as you have knowledge on that subject.

Answer. As to the persons who subscribed, and the amounts they subscribed, they will be found on pages 2, 3, and 4 of the record of the acts and proceedings of the board of directors. Transfers were very generally made to the city under the conditions contained in the articles of association, each subscriber retaining $300, which was paid to the company.

Question 4. Look at the schedule marked "No. 2," referred to in the deposition of Thomas L. Smith, and state if you know by whom it was made, and by whom the pencil-writing on the same was made, and on what basis the values that are indic'ted on that paper were made.

Answer. I have examined the schedule, and I believe the most of the pencil-writing here was made by Mr. Ely. The basis upon which the value of the property was fixed was what I, as one of the appraisers, believed it to be intrinsically worth at that time.

Question. 5. What was the object in making that schedule?

Answer. The object was to get the quantity of the land and the value before us for the purpose of making an apportionment between the parties interested.

Question 6. Do you know whether that apportionment was ever carried out afterwards, and how?

Answer. Yes, it was; by the parties selecting such pieces of the property as would cover about 50 per cent. of their judgments in the aggregate. All the parties being present agreed to it.

108 Question 7. Do you know whether any legal proceedings were ever instituted for the purpose of effecting that apportionment; and, if so, what?

Answer. I can only say that I instructed my attorney to join in such

legal proceedings as were necessary for that purpose, and he told me he had done so.

Question 8. Do you recollect the sale under the decree rendered on what is called the second mortgage? Was you present at the sale? and, if so, please state how the property was bid off, and by whom.

Answer. I don't recollect that I was present at the sale, and don't know by whom the property was bid off; I can only state that Mr. Ely informed me that he bid it off.

Question 9. Please look at that part of the schedule marked "No. 2," entitled "Schedule of the property covered by second mortgage," and state what you think the fair value of the property embraced under that head, in cash, was at a sheriff's sale.

(Objected to by plaintiffs' attorney.)

Answer. I cannot possibly state what it would bring at sheriff's sale. The property was worth what it is estimated at here at the time the figures were put down.

Question 10. State, if you know, whether at the time of making that appo'in/ment there was any understanding or agreement among the parties as to the effect or result of the apportionments in reference to the judgments which had been obtained by them; and, if so, what?

(Objected to by plaintiffs' attorney.)

Answer. I believe there was an understanding among the parties there that the property each received in that division was about 50 per cent. of the amount of their judgments, and I supposed that the judgments would receive credit, and knew nothing to the contrary until this suit commenced, as I expected my attorney to make the credit for me for that amount. I think it was further said at the time that the available means of the company were exhausted, and therefore we would not be able to obtain anything more upon our judgments.

Question 11. Do you know whether or not at that time a compromise which had been made by the railroad company with the city for the cancellation of the city stock was spoken of in the presence and hearing of Mr. Ely, or whether he was otherwise informed of it?

(Objected to by plaintiffs' attorney.)

Answer. I cannot say whether it was spoken of in his presence or not. It was very generally known here, having been published in the papers.

Question 12. If Mr. Ely had made any enquiries into the condition of the stock of the company, would he have had any difficulty in ascertaining that such a compromise had been made?

Answer. He would not.

Question 13. Did you know the firm of S. and C. Howard? and, if so, state who composed that firm.

Answer. Sebre and Charles Howard.

Question 14. State what manner of men they were as to respectability and business qualifications at that time.

(Objected to by plaintiffs' attorney.)

Answer. They were energetic, active business men; and, as far as I know, were amply responsible for their contracts then.

Question 15. Please look at the record-book of the board of directors of the railroad company, at page 31, and state whether the contract there recorded was the contract made with the company by them.

(Objected to by plaintiffs' attorney.)

109 Answer. The company made a contract with them which is set out at page 31.

Question 16. Please look at the same order-book, at page 94, at the date of October 26th, 1860, and state whether the proposition there

entered, as from them, was or was not the basis of the final settlement which was made with them.

(Objected to by plaintiffs' attorney.)

Answer. This proposition on pages 94 and 95, of the order-book, was the basis on which the company made a final settlement with the Howards.

Question. 17. State whether, from the time of the making of that contract up to the time of their final settlement, they were or were not fully acquainted with the affairs of the company and the condition of the stock subscriptions.

(Objected to by plaintiffs' attorney.)

Answer. They were fully acquainted with them.

Question 18. Do you know whether or not, at the time of the compromise with the city for the cancellation of the city stock, they were informed of that compromise and its conditions?

(Objected to by plaintiffs' attorney.)

Answer. They were informed of the compromise, and, I believe, the conditions.

Question 19. State, if you know, if any amount of the railroad company's stock was subscribed by them; and, if so, what amount; and whether the subscription, or any part thereof, has been paid?

(Objected to by plaintiffs' attorney.)

Answer. My recollection is that they subscribed $300,000 00, but it may be better shown by the books of the company; I don't recollect whether any part of it has been paid or not; that will also be better shown by the books of the company.

Question 20. Please look at the stock-ledger of the company at page 165, and state whether the amount of stock held by them is there stated, and explain the entries as well as you can.

(Objected to by plaintiffs' attorney.)

Answer. I see they are credited with various amounts of stock here. They agreed to take a certain portion of the amount of their contract in stock, and these amounts here were the amounts of stock they received in their monthly estimates, except one, which was capital stock, and one other, transferred from J. P. Allen, of $13,100 00. The item of $306,590 was their subscription of stock, which remains unpaid, or any part of it, that I recollect. I think there was a contingency in that subscription; that was, if the city took $400,000 00 stock their subscription was to be considered valid.

Question 21. Was or was not this contingency that you have spoken of made in a proposition to subscribe so much stock if the city would subscribe, or was the subscription made before the city had subscribed?

(Objected to by plaintiffs' attorney.)

Answer. My recollection is that it was in a proposition to subscribe the $300,000 00 if the city would subscribe; and the Howards did subscribe after the city had made its subscription.

Question 22. Look upon the balance-ledger of the railroad company, and state when this item of $306,590 is first entered there; and also upon the general-ledger, at page 171, and state if you can tell from those entries at what time this subscription of stock of the Howards
110 was made, and whether it appears from the books of the company that any part of it has been paid; and if so, what.

(Objected to by plaintiffs' attorney.)

Answer. It appears upon the balance-ledger, November 1st, 1855, on the general-ledger at page 171. They are charged with $306,590, but no

part of it appears to be paid. The subscription must have been made about the time of the entry in the general-ledger, Sep. 5th, 1855.

Question 23. Please state about what time the company suspended work upon its road.

Answer. I think it was some time in 1857.

Question 24. How many city bonds did the city issue to the railroad company?

Answer. Two hundred thousand dollars.

Question 25. Were any of these bonds sold for money, and, if so, how many, and for what price?

Answer. There were seven of them sold for money, at 75 cents to the dollar, as near as I recollect; they are still outstanding and unpaid.

Question 26. What became of the other 193 bonds?

Answer. They were returned to the city by the company.

Question 27. State why were the bonds returned to the city—for what purpose.

Answer. They were returned under a compromise between the railroad company and the city. The company was indebted to the Ohio Insurance Company in a large amount of money, ranging from $35,000 to $45,000; I don't recollect the precise amount. The city proposed to pay that debt in consideration of surrendering 193 bonds of a thousand dollars each by the company; and, in view of the bonds being rendered useless to the company in consequence of the various suits, and the noise and clamor of a portion of the citizens, the railroad company accepted the proposition from the city, the company believing it was better to give up the bonds and have the debt paid than to hold them in their then worthless condition. It was a part of the agreement that the railroad company should cancel the city's subscription for stock.

Question 28. State for what purposes that debt to the Ohio Insurance Company was incurred, and how the railroad company expected to obtain means to pay it.

Answer. It was incurred for the purpose of going on with the work on the road, assist in paying the monthly estimates, &c.; they expected to obtain means to pay it by the sale of those city bonds.

Question 29. Between the time of the sale of those seven bonds to Peirson and the compromise with the city, what difference, if any, had occurred as to the value of these bonds?

Answer. If there had been no suits commenced, nor any contest with the citizens in relation to their validity, the bonds would have readily brought 75 cents on the dollar; but, in consequence of these suits being brought between the time of the sale to Pierson and the time of the compromise with the city, they were rendered entirely unsaleable.

Question 30. Were any of those bonds held by the Ohio Insurance Company; and, if so, under what circumstances, and for what purpose?

Answer. The Ohio Insurance Company held some 80 bonds of a thousand dollars each as a collateral security for her debt.

Question 31. Do you know whether or not those debts were due before the compromise was made with the city, and whether the Insur-
111 ance Company threatened to take any proceedings in relation thereto; and, if so, what?

Answer. I think the debt was mostly due; it was in various sums. I think the Ohio Insurance Company threatened to sell the collateral securities, or offer them for sale, if there was not some provision made for the payment of their debts.

Question 32. Was or was it not in the power of the railroad company

to make any provisions for the payment of the debt, so as to prevent a sale by the Ohio Insurance Company of the city bonds so held by them as collaterals?

Answer. They had no available cash means, nor any other means better than what the insurance company held; therefore they could not pay the debt so as to prevent a sale of the bonds.

Question 33. State what influence, if any, the condition of these bonds deposited as collateral had in bringing about the compromise with the city.

(Objected to by plaintiffs' attorney.)

Answer. I think it had a very considerable influence with both the city and the railroad company; the consequence of the compromise not being had would have been that the bonds would have been offered for sale; whether they would have brought anything or not, I cannot say.

Question 34. State what, in the best of your opinion, the whole of the 193 bonds of the city was worth at that time, and what amount of money could have been raised upon them by sale or otherwise.

Answer. It is a question that I cannot answer. There did not appear to be any value upon them, they got so low down; there was so much fuss about them. The railroad company thought it was a good arrangement to have the city pay the debt to the Ohio Insurance Company, and the railroad company give up the city bonds, 193, and cancel the city stock.

Question. 35. Who made the first proposition to compromise, the city or the railroad company?

Answer. I do not clearly recollect.

Question 36. Can you state whether or not the city was advised as to the conditions of the bonds that were pledged as collaterals before the compromise was made?

Answer. She was advised of the condition of the bonds; the railroad company being unable to make sale of them to pay the debt of the Ohio Insurance Company for which they were pledged.

Question 37. Please state whether or not the 193 bonds returned to the city, pursuant to the compromise, could at that time, or within a reasonable time thereafter, have been sold by the railroad company for more money than was paid for them by the city, pursuant to the compromise; and, if so, how much?

(Objected to by plaintiffs' attorney.)

Answer. I think they could not have been sold for more money than was paid for them by the city, for the reason that the president and secretary made efforts to sell them in the city of New York and elsewhere, and failed to get an offer for them at any price.

Question 38. State whether or not those bonds could have been disposed of in any other way more advantageously to the interest of the railroad company or its creditors; and, if so, in what way?

(Objected to by the plaintiffs' attorney.)

Answer. I think they could not have been at that time, or any reasonable time thereafter.

Question 39. What do you mean by reasonable time?

112 Answer. Any time during the liquidation relating to the bonds then pending in the courts.

Question 40. What was the condition of the railroad company in relation to debts at the time the compromise was made with the city?

Answer. She owed this debt to the Ohio Insurance Company previously spoken of, and, I think, something to her officers for services.

She owed another debt, which had been assumed by some of the directors in the three banking institutions—the Ohio Company, the Bank of the State at New Albany, and the Bank of the State at Jeffersonville, amounting, I think, to about $18,000 00. I don't recollect any other debts. I think the railroad company probably owed the contractors something, which was afterwards settled, as the books of the company will show.

Question 41. In making the compromise with the city, was there or not any intention of the railroad company to hinder, delay, defraud, or otherwise injure its creditors?

(Objected to by plaintiffs' attorney.)

Answer. There was no such intention as I am aware of.

Question 42. At the time of the reduction of stock by the individual subscriptions to the articles of association, pursuant to those articles, and the orders passed by the board of directors of the railroad company for that purpose, were or were not the city authorities informed of the provisions to that effect in the articles of association, and the said order passed by the board of directors, and of the intention of the individual subscribers to make such reduction?

(Objected to by plaintiff's attorneys.)

Answer. I think there was no doubt of it. The mayor of the city and one or more members of the city council were parties to the articles of association and directors of the railroad company afterwards.

Question 43. After the reduction of stock had been made by the several individual subscribers to the articles of association, to the sum of $300 00, was that amount of stock so retained by them in all cases fully paid up?

Answer. In the foregoing part of my deposition I stated that I believed that the $300 of each subscriber had been paid up; but I find, upon examination of the stock-ledger, that I was mistaken; that some of the subscribers had not fully paid, and some of them paid nothing.

Question. 44. When did you first heare of any question being made as to the validity of the compromise with the city, and the cancellation of its subscription for stock?

(Objected to by the plaintiff's attorney.)

Answer. I have no recollection of hearing the validity questioned until the commencement of the present suit by Ely and others in the Federal courts.

Cross-examination by S. Burke, for plaintiffs:

Question 1. Did not the city of New Albany vote upon its stock at the various elections of directors of the company, and take such interest in the affairs of the company as other stockholders did?

Answer. I think she did up to the time of the compromise.

Question 2. State whether the city of New Albany, in 1857, and from that time up to the present time, was responsible and perfectly able to pay all its legal obligations?

113 Question 3. Was not the market value of the city bonds in 1857 affected and depressed wholly in consequence of the suits brought against the city to enjoin the collection of taxes for their payment, and by the clamor of the citizens of the city in respect thereto, and not by reason of any inability of the city to respond to its legal obligations?

Answer. I think so. The clamor was about the legality of the bonds, which, together with the suit brought to enjoin the collection of taxes,

brought such an odor upon those bonds that they could not be sold, and not on account of any inability of the city to pay interest or otherwise.

Re-examination for defendants:

Question 1. Was this clamor you have just spoken of raised by the citizens of New Albany generally, or by a portion of the citizens only; and, if so, by what proportion of the citizens?

Answer. It was not raised by the citizens generally, but that portion which opposed the railroad subscription by the city; the number I cannot definitely say, but it was a minority, aided by one or more of among the best lawyers of the place.

JAMES MONTGOMERY.

SATURDAY, *April 24th*, 1869.

John S. Davis, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Question 1. Mr. Davis, please state whether you held any office in the Ohio Insurance Company in the year 1857; and, if so, what.

Answer. I was a director and acting a' president of the company.

Question 2. State, if you know, whether the New Albany and Sandusky City Junction Railroad Company was indebted to the Ohio Insurance Company in any amounts; and, if so, what amounts, and for what purposes was the indebtedness incurred, in 1857?

Answer. In 1857, I believe it was, the New Albany and Sandusky City Railroad Company borrowed of the Ohio Insurance Company, I think, about $35,000, in anticipation of expected sale of city bonds. The money was borrowed to be used in the construction of the road and in making necessary surveys, &c.

Question. State if the Ohio Insurance Company held any collateral securities for the payment of that debt; and, if so, what.

Answer. The railway company deposited with the insurance company, as collateral security for the debt, bonds of the city of New Albany, amounting, I think, to about $80,000.

Question 4. Please state if that debt was ever paid; and, if so, by whom, and under what circumstances.

Answer. It was paid by the city, I think, under an arrangement made between the railway company and the city, the exact terms of which I can't now state; but they will be found in an ordinance of the city on that subject.

Question 5. Please state whether, before that arrangement was made, and demands had been made by the insurance company of the railroad company for the payment of the debt, and whether any proceedings were threatened in case of its non-payment; if so, what.

Answer. The insurance company had requested the railroad company to pay the debt many times, and we informed them, unless some arrangement was made, we would sell the collaterals in our hands.

Question 6. Please state, if you know, what was the market
114 value of those city bonds at that time, and what they could have been sold for if a sale had been made.

Answer. I do not think it can be said they had a market value at that time. The bonds might, perhaps, have been sold for 15 to 20 cents on the dollar.

Question 7. Please state, if you know, how many bonds had been issued by the city of New Albany in payment of its subscription of stock to the railroad company.

Answer. I think the amount was $200,000.

Question 8. Do you know whether or not the railroad company had at that time any available means, except these city bonds, to pay the debt of the Ohio Insurance Company?

Answer. I know of no other means, unless it might have been some real-estate bonds that she may have had an interest in at the time.

Question 9. Do you know the number of real-estate bonds she had an interest in at that time, and what amount of money could have been produced by the sale of those bonds?

Answer. I can't say precisely, but I think in the neighborhood of $25,000. They were worth, I believe, from 20 to 30 cents on the dollar.

Question 10. Do you know what was done by the railroad company with those bonds?

Answer. They were given over to certain parties to repay or secure them in certain moneys they had to pay for the railroad company, so far as I remember, which were other debts than the one heretofore spoken of.

Question 11. Do you know the condition of the railroad company at that time, and whether any portion of its railroad was ever completed?

Answer. The financial condition of the company was very bad, and no portion of the road was ever completed.

Question 12. Do you know what became of the city bonds pledged to the Ohio Insurance Company as collateral, and the other bonds which had been issued by the city?

Answer. I believe the bonds were surrendered to the city in pursuance of the arrangement, 193 of them; they were bonds for $1,000 each.

Question. Please state whether or not the 193 bonds thus returned to the city could at that time, or in any reasonable time thereafter, have been sold by the railroad company; and, if so, how much could they have been sold for?

Answer. I don't think they could have been sold for more than enough, if enough, to pay the debt of the Ohio Insurance Company.

Question 14. State whether or not those bonds could have been disposed of in any other way more advantageously in the interest of the railroad company or its creditors; and, if so, in what way.

Answer. I do not think they could at and about that time.

Question 15. Did you appear for any of the parties in what is called the Lindley suit, tried before Judge Jewett, in the Floyd circuit court, in January or February, 1868?

Answer. I did appear for myself and for several other defendants, as attorney, in that suit.

Question 16. Do you know of any verbal agreement as to the issues or the admission of evidence during the trial of that suit? If so, what was it? Please give all the circumstances.

Answer. I know that Judge Burke offered, and I believe did file some bonds, and perhaps an answer, which I think was afterwards withdrawn and some other paper filed in its stead with the bonds. I cannot
115 state positively. It was claimed, on the part of the defense, that we had a right to answer his complaint, or whatever it was he filed with the bonds. According to my recollection, some arrangement was made, and the trial progressed with. What that arrangement was I don't remember. According to my recollection, it was made in relation to the admission of evidence, and made in open court, but by whom I can't state.

At this point the cross-examination began:

Question 1. During the trial of that cause, did you hear any question made or discussed in court as to whether the real-estate bondholders had received from the railroad company the real estate mentioned in the mortgage in full payment in satisfaction of their judgments or bonds against the company?

Answer. I have no recollection of hearing anything of that sort when I was there, and I don't think any such question was made in court, for I was there nearly all the time. I was absent part of the time. I heard no proof of that sort that I recollect of.

JOHN S. DAVIS.

The said George V. Howk, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by defendants' counsel:

Question 1. Please state if you was present at the trial of what was called the Lindly suit in the Floyd circuit before Judge Jewett in January or February, 1868; and, if so, if you know of any verbal agreement as to the issues or evidence to be introduced made by the parties during that trial; and, if so, what was the agreement, and state all the circumstances?

(Objected to by plaintiffs' attorney.)

Answer. I was present during that trial as attorney for some of the defendants claiming title to parts of the premises in controversy in that case. After the trial had progressed some time, Judge Burke, on behalf of himself and the other complainants in this court, filed several answers and cross-complaints in the said Lindley case, setting up therein that he and they were severally the owners of the real-estate bonds secured by the mortgage then sued on. As attorney for a portion of the defendants whom I represented, I then asked for time to prepare their answers to said cross-complaint; and in response to a suggestion that I could plead nothing but the general denial under oath, I stated that I desired to plead payment. It was then agreed, in order to save time, that all proper matters of defense might be given in evidence without the same having been pleaded. This agreement was made in open court, and without objection from any of the parties interested in the case, or their counsel, and was acted upon in the introduction of evidence without objection on the further trial of the cause. This agreement was made by the parties and attorneys present, Judge Burke being present as counsel for himself and other parties.

Cross-examined by plaintiffs' attorney:

Question 1. Who did you appear for in the Lindley case?

Answer. For Mary M. Fitch, David H. Cadwalder, James Montgomery, Cassander Weir, and the heirs and administrators of W^m M. Weir, deceased, and there may have been others, but I cannot recollect without reference to the records. The parties whos' interests I was really aiming to protect in the suit were Mary M. Fitch, David H. Cad-
116 walder, and Cassander Weir, who were severally the owners of parts of the mortgaged premises.

Question 2. Is it not true that this conversation you allude to occurred after I filed the first answer that I filed in that case, and that those cases were afterwards withdrawn, and the case tried without any reference to them?

Answer. My recolleetion is decidedly to the contrary. I have no

doubt, so far as I was concerned in the case, that the trial of the case progressed and was concluded under the provisions of the agreement referred to in my answer to the first question by defendants.

GEORGE V. HOWK.

The said Stevenson Burke, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said case, deposes as follows:

Examined by defendants' attorney:

Question 1. Please state what interest you claim on your own behalf in the Pepin judgment set out in your bill of complaint, and when and how you acquired such interest.

Answer. I claim the interests that belonged to E. Dewitt, R. C. Dewitt, Sarah Coit Day, Samuel J. Andrews and wife, and A. H. Mass. I acquired these interests in the fall and winter of 1867 by purchase and written assignments.

Question 2. How much have you paid or have agreed to pay on account of such purchase and assignment? If you have already paid anything in cash, state how much.

(Objected to on ground of immateriality.)

Answer. I bought four of the bonds, standing in the name of R. C. Dewitt first. I paid in cash for them within a few dollars of $1,200 00, and released an interest in a mortgage which I considered of considerable value, but its actual cash value I cannot determine; it was a mortgage of indemnity. The other bond represented by R. C. Dewitt I paid about $300 00 for. The shares owned by Elijah Dewitt, (he owned seven shares,) I paid $3,500 00 for. The share owned by Mass I paid $300 for, and there was some expense connected with it, amounting to five or ten dollars more, which I paid. The bonds belonging to Sarah Coit Day and Samuel J. Andrews and wife were purchased of them by Mr. Heman Ely and assigned by them to me; I paid $200 00 in cash and exchange upon the draft, and was to attend to the litigation in the Lindley case, the sale of the real estate here, free of any charge to Mr. Ely upon his shares. There were eight bonds in all belonging to Mrs. Day and Mrs. Andrews. I took the above assignments of judgments subject to all risks, and unpaid taxes and assessments upon the real estate, and subject to the existing litigation at that time. The consideration above specified covered not only their interests in the judgments or bonds above specified, but also their interests in the real estate held by Heman Ely.

On cross-examination:

Question. State any other matter or thing you may know connected with said case.

Answer. I purchased all of said shares and interests before I ever came to New Albany or saw any of the real estate held by Ely. I purchased upon the representations of others, and because I wanted
117 a little outside business to occupy my leisure time, being at that time on the bench as judge of the court of common pleas and district court in Ohio, and having considerable leisure time. Some of the transfers were made to me after I first visited New Albany, but the propositions to buy and transfer were agreed upon before. I came to New Albany some five or six times in connection with the trial of the Lindley case, sometimes remaining here but a short time, and then other times for a week or more. I found a considerable amount of unpaid taxes upon the real estate, amounting in all, with street improvement tax, to about $2,500. Each time I came I had to come a distance of

near or quite four hundred miles. The whole of the real estate held by Ely, and represented by 47 bonds, I do not believe to be worth more than fifteen thousand dollars in cash above taxes and expenses of making deeds. I am well acquainted with all of said property, and have very full information as to its value by conversation with others. I wish to say that I was present during the trial of the Lindley case, and that I do not remember the conversation or agreement named by Judges Howk and Smith in their depositions. Of their real estate so represented by Ely, I own $\frac{2}{4}$ths under said purchase and assignments.

(Objected to by defendants.)

STEVENSON BURKE.

STATE OF INDIANA, *Floyd County, sct:*

I, W'm J. Hisey, a notary public within and for said county and State, hereby certify that the above Thomas L. Smith, James Montgomery, John S. Davis, George V. Howk, and Stevenson Burke, *was* by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to the said cause; that their depositions were for the most part reduced to writing by me, and what part of them was not written by me was written by others by the consent of all the parties; that the said Heman Ely and others, adverse parties, and plaintiffs in this suit, appeared by Stevenson Burke, their attorney; that the said depositions were taken at the law office of Kerr and Ghormley, in the city of New Albany, Floyd County, Indiana, by consent of parties, between the hours of 8 o'clock a. m. and 5 o'clock p. m. of each of the following days, commencing Tuesday, April 20th, 1869, and adjourning from day to day, Sunday, April 25th, excepted, until this date.

In testimony whereof I have hereunto set my hand and affixed my official seal this 26th day of April, 1869.

[SEAL.] WILLIAM J. HISEY, *Notary Public.*

No. 2.

Schedule of property covered by original mortgage.

Number.		Description.	Value.		
	1	Lots 1 & 2, Lower Water st..	1,000	H. Ely.....	1,000
48, 49, 50, 66, 67, 68, 69, 70, 71.	2	Mount Isham plat.....No. 43	2,000	J. S. McDowell.....	2,000
		" " " " 44			
		" " " " 45			
		" " " " 46			
		" " " " 47			
		" " " " 48			
		" " " " 49	400		
		" " " " 50			
118		" " " " 66			
43, 44, 45, 46, 47, 61, 62, 63, 64, 65.	3	" " " " 67	500	H. Ely.....	2,500
		" " " " 88			
	4	" " " " 61	800		
		" " " " 62			
		" " " " 63			
		" " " " 64			
		" " " " 65			
		" " " " 69	800		
		" " " " 70			
		" " " " 71			
	5	Noys & Chris. plat.....41	500	H. Ely.....	500
		" " " 42			
		" " " 43			
		" " " 44			
		" " " 45			
	6	S. ½ lot 26, 30 feet front.....	900	J. L. Davis.....	955
	7	W. ½ S. E. qr., sec. 6, 80 acres..	368	Sold.	
	8	Up'er 1st street.....No. 1	3,000	H. Ely.....	3,000
		" " " " 3			
		" " " " 5			
	9	½ lot 28 Up'er 4th street	200	Pepin, p'r Myers.....	200
	10	Branch street.....lot 2	200	Pepin, p'r Culbertson.....	200
		" " ..... " 3			

11	20 acres 142 perches	1,550	H. Ely	1,550	
12	Tract of land, 1¼ acres	91	Sold.		
13	Spring street, No. 53	1,300	J. Montgomery	1,300	
	" " " " 55				
	" " W. ½, 57	1,500			
14	Lot 27, Illinois grant, 11 96-100 A	1,200	J. Montgomery	1,500	00
15	E. ½ S. E. q'r, sec. 33, 30 acres	540	Sold.		
16	Scott street, No. 1	400	McDonald	90	00
	" " " 2		J. Montgomery	90	
	" " " 3		Kerr	100	
	" " " 4		Pepin	100	
17	Jackson street, 10	700	H. Ely.		
	" " 11		H. Ely.		
	" " 12		T. L. Smith.		
	" " 13		Pepin, p'r Noys.		
	" " 14		J. Montgomery.		
	" " 15		H. Ely	308	
	" " 16		H. Ely		
	" " 17		H. Ely		
	" " 18		H. Ely		
18	Block 7, White Hill tract	2,500	H. Ely	2,500	00
19	Part lot 2, Lower Water st	1,000	H. Ely	1,000	
20	W. ½ lot 8, on State st	5,000	T. L. Smith	5,000	
21	P't N. W. sec. 10, 17 acres	2,100	H. Ely	2,100	
22	Poplar street, No. 17	57	Sold.		
	" 18	51			
	" 19	50			
	" 20	51			
	" 21	50			
	" 22	26 50			
	" 23	50	Pepin, p'r Noys	45	
	" 24	50			
	Elm street, 30		H. Ely	75	
	" 31	300	H. Ely	75	
	" 32	300	H. Ely	75	
23	" 33		H. Ely	75	
	" 34		Pepin, p'r Noys	75	
	" 35		Pepin, p'r Noys	75	
	" 36		W. M. Weir	75	
	" 37		T. L. Smith	75	
24	Shipping street, 25	75	H. Ely	75	00
	" 26	75	H. Ely	65	00
	" 27	75	Pepin, p'r Noys	75	00
	" 28	24 50	Sold.		
	" 29	31 50	"		
25	39 f't front on Lower High st	1,300	H. Ely	1,300	
26	N. ½ N. E. q'r, sec. 34, 80 A	7,000	Pepin	7,000	
27	P't letter H, in No. 42, 15 63-100 A	4,700	T. L. Davis	4,700	
28	½ p't out-lot No. 15, 6 52-100 A	1,000	T. L. Davis	1,200	
29	N. ½ lot 27, Upper 1st st	1,000	H. Ely	1,000	
30	N. ½ lot 2, on State st	800	H. Ely	800	
31	Lots in Clark & Elkers' plat	1,500	T. L. Davis	2,075	

119 *Schedule of property covered by second mortgage.*

1	158 f't on Upper 6th st	1,000	McDonald & Mann	1,000	
2	10 acres of No. 50, Clarksville plat		Montgomery & Davis	225	
3	Out-lot 2, 1st range out-lots	4,500	H. Ely	4,500	
4	No. 14, W. 8 N. plat	100	T. L. Davis	200	
5	Lower 7th st, No. 12				
	" 14				
	" 16				
	" 17				
	" 18				
	" 19	1,600	H. Ely	1,600	
	" 20	1,600	H. Ely	1,600	
	" 21				
	" 22				
	" 23				
	" 24				
	" 25				
	" 26				
6	Evans st, No. 15	1,300	H. Ely	1,300	
	" 17				
	" 23				
	" 25				
	" 27				
	" 29				
7	S. 10 f't, No. 19				
	Upper Vincennes st, " 49	75	Pepin, p'r Noys	35	
	Anderson lot	800	Pepin, p'r Noys	1,005	
				11,465	

Amount of Ely's property, $26,998.

Pleas before the honorable the judge of the Floyd circuit court, continued and held by adjournment at the court-house in the city of New Albany, on the 18th day of February, 1868.

Present, Hon. George A. Bickwell, judge.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, John P. Putnam, Herman Ely, Stevenson Burke, Herman Ely, executor of the will of C. Arthur Ely, deceased, John N. C. Wilson, and others.

Be it remembered that heretofore, to wit, on the 19th day of February, 1863, the plaintiff, by James and Alfred B. Collins, his attorneys, filed his complaint herein; which reads in the words and figures following, to wit:

State of Indiana, Floyd County, in the Floyd circuit court, of April term, 1863.

WILLIAM LINDLEY, PLAINTIFF,
vs.
WALTER MANN, JOHN S. DAVIS, THOMAS L. Smith, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Michael C. Kerr, Robert M. Weir, Andrew B. Weir, Sarah A. Weir, Trevanion T. Weir, Samuel R. Weir, Cassandra Weir, Mary R. Weir, John S. Weir, Susan C. Weir, The New Albany and Sandusky City Junction Railroad
120 Company, William S. Pearson, jr., Harvey Seymour, John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah DeWitt, Rollin C. DeWitt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Victor A. Pepin, defendants.

The said plaintiff, who sues for himself and for all others holding bonds, similar in character to the three held by him, of the 110 hereinafter named, complains of the defendants, and charges that heretofore, to wit, on the 20th day of September, 1854, the said defendant, The New Albany and Sandusky City Junction Railroad Company, made their certain one hundred and ten bonds for the payment of one thousand dollars each, with coupons attached, and numbered from one to one hundred and ten, inclusive; that, of said 110 bonds, he, the said plaintiff, holds and owns three, with their interest-warrants attached, said three bonds bearing the numbers 4, 5, and 7, copies of which are herewith filed and prayed to be taken as a part of this complaint; that, to secure the payment of said 110 bonds, the railroad company on the same day, to wit, the 20th day of September, 1854, executed to the said William S. Pierson and Harvey Seymour a mortgage in trust; that said railroad company made an additional agreement with said Seymour and

said Pierson, in relation to said bonds, on the 7th day of October, 1854; the said mortgage was duly recorded in the Floyd County recorder's office on the 20th day of September, 1854, and said supplemental agreement was duly recorded on the 7th day of October, 1854, in the recorder's office of Floyd County; copies of said mortgage and said supplemental agreement, duly certified, are herewith filed and prayed to be taken as a part of this complaint; that said railroad company, by said mortgage and supplemental agreement; mortgaged to said Pierson and Seymour a large quantity of lands in trust for the payment of said bonds, which lands lie in said county of Floyd, and are particularly described in said mortgage and supplement; that in 1855 said railroad company failed to meet its interest warrants, and on the day of October, 1862, said plaintiff caused the coupons of the three bonds, of which he is the owner, to be presented at the counter of the People's Bank of the city of New York, payment of which was then and there refused for want of funds. He further charges that said Pierson and Seymour are not residents of the State of Indiana, and have ceased to give any attention whatever to the duties of their said trust, tho' they had fully accepted the same, and agreed to execute it, as appears on the face of said bonds, and so said plaintiff charges that he has now the right to demand the sale of said mortgaged lands to satisfy his said bonds and the interest thereon, as no part thereof has been paid, but the whole amount remains unpaid. The said plaintiff further charges that Sarah A. Weir, Samuel R. Weir, Mary R. Weir, John S. Weir, and Susan C. Weir are minors, under the age of 21 years, for whom he prays your honor to appoint a guardian ad litem herein.

He charges that he is informed and believes that said other defendants, besides said Seymour and Pierson, claim some interest herein, and therefore he makes them defendants hereto. He prays that said several defendants may be summoned to answer this complaint, and that said lands may, by order of this court, sold by said trustees or otherwise, and enough of the proceeds applied to the payment of said three bonds and interest; that the amount of his said bonds may
121 be ascertained, and he recover judgment therefor to the amount of seven thousand dollars, for which he demands judgment and all other proper relief.

J. AND A. B. COLLIN,
Attorneys for Plaintiff.

The bonds Nos. 4, 5, and 7, mentioned in said complaint, and made a part thereof, read in the words and figures following, to wit:

United States of America, State of Indiana.

No. 4. $1,000.

One thousand dollars.

The New Albany and Sandusky City Junction Railroad Company acknowledges that it owes, upon the sale of this bond, one thousand dollars, which sum said company promises to pay to John S. Yelverton, or bearer, at the People's Bank in the city of New York, on the first day of January, one thousand eight hundred and sixty-five, and also the interest thereon at the rate of seven (7) per centum per annum, semi-annually, on the first days of July and January in each year from the date hereot, on the presentation of the annexed interest-warrants at said bank until the said principal sum shall be paid. And said company also agrees that the holder of this bond shall have the

privilege of converting it into twenty shares, of fifty dollars each, of the capital stock of said company, upon delivering it with the unpaid coupons to the secretary, at the office of said company, in exchange for such stock at any time within five years from the date hereof. And said company also agrees that all rights and benefits arising hereupon may be transferred by general or special endorsement, or by delivery, as if the same was a note of hand, payable to bearer, and hereby waives all benefit from valuation or appraisement laws.

In testimony whereof the said company has caused its corporate seal to be hereto attached, and these presents to be subscribed by its president, and countersigned by its secretary, this twentieth day of September, one thousand eight hundred and fifty-four.

J. MONTGOMERY,
President.

Countersigned:
THOMAS L. SMITH, *Secretary.*

The undersigned trustees hereby certify that the New Albany and Sandusky City Junction Railroad Company has conveyed to us by deed, bearing date the twentieth day of September, 1854, the real estate described in a schedule, accompanying the same, in trust for the use and benefit of the holders of the above bond and one hundred and nine others of a similar tenor, effect, and amount, with power to sell said lands on default of payment of said bonds, or interest warrants, or either of them, and pay the same out of the proceeds of said real estate, which is situated in the State of Indiana, was taken by said company for stock, and has been appraised to be of the value of one hundred and fifty-four thousand eight hundred and fifty-five dollars, as by reference to said deed of trust, which has been duly recorded in the counties where said lands are situated, will more fully and at large appear.

Dated at New York, September 30th, 1854.

WILLIAM S. PIERSON,
HARVEY SEYMOUR,
Trustees.

122 $35. *Interest warrant.* No. 20.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank, in the city of New York, on the first day of January, 1865, thirty-five dollars, interest due on real-estate bond No. 4.

THO'S L. SMITH,
Secretary.

$35. *Interest warrant.* No. 19.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank, in the city of New York, on the first day of July, 1864, thirty-five dollars, interest due on real-estate bond No. 4.

THOMAS L. SMITH,
Secretary.

$35. *Interest warrant.* No. 18.

The New Albany and Sandusky City Junction Railroad Company will

pay the bearer, at the People's Bank, in the city of New York, on the first day of January, 1864, thirty-five dollars, interest due on real-estate bond No. 4.

THOMAS L. SMITH,
Secretary.

$35. *Interest warrant.* No. 17.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank, in the city of New York, on the first day of July, 1863, thirty-five dollars, interest due on real-estate bond No. 4.

THOMAS L. SMITH,
Secretary.

$35. *Interest warrant.* No. 16.

The New Albany and Sandusky City Junction Railroad Company will pay the bearer, at the People's Bank, in the city of New York, on the first day of January, 1863, thirty-five dollars, interest due on real-estate bond No. 4.

THOMAS L. SMITH,
Secretary.

(Endorsed:)

New Albany and Sandusky City Junction Railroad Company real-estate bond No. 4. One thousand dollars. Interest seven per cent., payable July 1st and January 1st, and redeemable in New York January 1st, 1865.

The undersigned, president and secretary of the New Albany and Sandusky City Junction Railroad Company, do hereby certify that the within bond was issued by due authority of law, and said company is bound for the payment thereof, with the interest coupons thereto attached, without any relief from valuation or appraisement laws, and that they are duly authorized to sell the same in or out of this State for the best price they can obtain.

They further certify that this bond is secured by deed of trust to William S. Pierson, j'r, and Harvey Seymour, upon real estate lying in the State of Indiana, which said company holds by good title, free and clear of any incumbrances whatever, and is believed, upon strict
123 examination of all the records and deeds relating thereto, and is, in our opinion, amply sufficient to pay this bond and all other bonds secured by said deed of trust.

Witness our hands, at New Albany, Indiana, this twentieth day of September, 1854.

J. MONTGOMERY, *President.*
THOMAS L. SMITH, *Secretary.*

(The bonds, numbers 5 and 7 are the same No. 4, with the exception of the numbers.)

The copies of mortgage in trust and supplemental agreement mentioned in said complaint and made a part thereof, read in the words and figures following, to wit:

This mortgage is set forth in record of Victor A. Pepin vs. The New Albany and Sandusky City Junction Railroad Company et al., offered in evidence by the complainants.

Upon the filing of said complaint and exhibits, the following summons issued, to wit:

The State of Indiana to the sheriff of Floyd County, greeting:

We command you summon Walter Mann, John S. Davis, Thomas L. Smith, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Michael C. Kerr, Robert M. Weir, Cassandra Weir, Mary R. Weir, John S. Weir, Susan C. Weir, and The New Albany and Sandusky City Junction Railroad Company, impleaded with William S. Pierson, jr., Harvey Seymour, John P. Putnam, Samuel J. Anderson, and others, if they be found in your bailiwick, personally to appear before the honorable Floyd circuit court, on the second day of the next term thereof, to be holden at the court-house in the city of New Albany on the 4th Monday of April, 1863, then and there to answer the complaint of William Lindley, and of this writ make due service and return.

Witness William W. Tuley, clerk of said court, and the seal thereof affixed at the court-house, in New Albany, this 19th day of February, 1863.

[L. S.] W'M W. TULEY, *Clerk.*

[50 R. S. 50.]

Upon said summons, the sheriff made the following return, to wit:

Served on the within-named Walter Mann, John S. Davis, Thomas L. Smith, Charles B. Applegate, John S. McDonald, William B. Lent, Michael C. Kerr, Robert M. Weir, Cassandra Weir, Mary R. Weir, John S. Weir, Susan C. Weir, by reading to them in their presence and hearing, and on John C. Childs, secretary of the New Albany and Sandusky City Junction Railroad Company. The within-named James Montgomery not found in my bailiwick.

April 4th, 1865.

STEWARD SANDFORD,
Sheriff F. C.
By GEORGE W. JONES, *Deputy.*

And upon the filing of said complaint, the following publication was made, to wit:

124 State of Indiana, Floyd County, sct., in the Floyd circuit court, April term, 1863.

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, JR., HARVEY SEYMOUR, John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Victor A. Pepin, impleaded with Walter Mann, Samuel H. Patterson, John S. Davis, Thomas L. Smith, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Michael C. Kerr, Robert M. Weir, the New Albany and Sandusky City Junction Railroad Company, and others.

On this 19th day of February, 1863, the plaintiff, by James and

Alfred B. Collins, esqrs., his attorneys, filed his complaint herein, and also an affidavit, from which it appears that a cause of action exists herein against said defendants; that said cause of action relates to real estate, and that they are not residents of the State of Indiana. Therefore the said William S. Pierson, jr., Harvey Seymour, John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Victor A. Pepin, implead' as aforesaid, are hereby notified of the pendency of this action, and that the same will stand for trial at the next term of said court, to be holden at the court-house in the city of New Albany, on the fourth Monday of April, A. D. 1863.

Test: WILLIAM W. TULEY, *Clerk.*

Office of the New Albany Daily and Weekly Ledger, newspaper of general circulation, printed and published in Floyd County, Indiana, and that the annexed advertisement in the case of Lindley vs. Pierson and others was published three consecutive weeks in said newspaper, commencing on the 25th day of February, 1863. And further says not.

L. G. MATHEWS.

Subscribed and sworn to before me this 28th day of April, 1863.

W. W. TULEY, *Clerk.*

And afterwards, to wit, at the April term of said Floyd circuit court, on the 12th day of May, 1863, comes the plaintiff, by James Collins and Son, his attorneys, and the defendant Victor A. Pepin appears by R. Crawford and Sons, his attorneys, and is ordered to answer the complaint.

And he files his answer thereto, which answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY RAILROAD COMPANY AND OTHERS.

Victor A. Pepin, for answer to the complaint in this action,
125 adopts the answer of his co-defendants, John P. Putnam and others, and says that the matters therein contained, are true in manner and form as the same are therein alleged. Therefore he prays judgment.

CRAWFORD AND SON, *P. D.*

And the defendants, William Pierson and Harvey Seymour, appear by their attorneys, Smith and Kerr, and are ordered to answer the complaint, and they file their answer thereto, which answer reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, HARVEY SEYMOUR, AND others.

Said William S. Pierson and Harvey Seymour, for separate answer to the plaintiff's complaint herein, say:

That, at the October term of this court, in the year 1857, one Victor A. Pepin instituted an action in said court against these respondents and the other parties named in his complaint in said action, upon certain of the bonds secured by the mortgage in the plaintiff's complaint in this suit mentioned, among which were the three identical bonds now sued upon, and praying for the foreclosure of said mortgage and a sale of the mortgaged premises for the payment of the same. Such proceedings were had in said former suit that the holders of all the bonds issued by said railroad company, and secured by said mortgage, said bonds being one hundred and ten in number, and for the payment of $1,000 each, with interest warrants, appeared and filed their answers; and issues being joined thereon, said court, at said term, rendered a judgment for the foreclosure of said mortgage, and the sale of all said mortgaged property for the payment of the debts found to be due to the several holders and owners of said bonds. A copy of said judgment is filed herewith and made part thereof.

Afterwards the said Charles Frederick, the commissioner appointed by said court to make sale of said mortgaged premises, pursuant to said judgment, did, on the 30th of March, 1858, sell said premises, and at the April term of said court, in the year 1858, made his report in writing to said court of the sale thereof, a copy of which report is filed herewith and made part thereof.

Afterwards, at the same term of said court, approved and confirmed said sale and ordered said commissioners to make conveyance to said purchasers of said mortgaged premises for the portions purchased by them respectively, a copy of which order of confirmation by said court is also filed herewith and made part hereof.

Said sale included all the property secured by said mortgage, and all of it was conveyed by said commissioner to the purchasers mentioned in his said report of sale; and all the proceeds of said sale, after payment of the costs and charges, was duly applied to satisfaction of said several mortgaged debts specified in said judgment.

These respondents therefore say that they have fully performed all the duties of their said trust, and have been discharged therefrom; and they pray to be hence dismissed with their reasonable costs.

SMITH AND KERR,
Attorneys for Pierson and Seymour.

126 This answer was amended at October term, 1863.

Amended answer afterwards filed, and the defendants John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, Thomas L. Smith, Michael C. Kerr, and The New Albany and Sandusky City Junction Railroad Company, appears by Smith and Kerr, their attorneys, and are ordered to answer the complaint; and they file their answer thereto.

The defendant Cassandra Weir, senior, appears by Robert M. Weir, her attorney, and waives the issuing and service of process herein, and is ordered to answer the complaint; and it is shown to the court by the sheriff's return, that the summons herein was personally served upon the defendants Sarah A. Weir, Cassandra Weir, Mary R. Weir, John S. Weir, and Susan C. Weir more than ten days before the first day of the present term of this court; and it is also shown to the court that they are all infants; whereupon George N. Hawk, esq'r., is appointed their guardian ad litem, and is ordered to answer the complaint. The defendants John S. McDonald and Walter Mann, appear by their attor-

neys, Crawford and Son, and are ordered to answer the complaint, and they file their answer thereto; which answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY CITY RAILROAD COMPANY.

John S. McDonald and Walter Mann answer the complaint, and aver that all the matters set out in the answer of his co-defendants, Putnam and others, are true, in manner and form as they are therein alleged.

Wherefore they pray judgment.

CRAWFORD AND SON, *P. D.*

And the defendants Samuel H. Patterson, William B. Lent, Charles B. Applegate, and John S. Davis, their attorney, and file their demurrer to the complaint; which demurrer reads in the words and figures following:

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, JR., AND OTHERS.

Samuel H. Patterson, William B. Lent, Charles B. Applegate, and John S. Davis, four of said defendants, demur to the plaintiff's complaint for the reasons following:

First. That said complaint does not state facts sufficient to constitute a valid cause of action.

DAVIS,
Attorney for Defendants.

Which demurrer is overruled by the court, and said last-named defendants are again ordered to answer the complaint.

And the defendants Lent, Applegate, and Davis file their joint answer, which reads in the words and figures following, to wit:

127 In the Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY CITY JUNCTION RAILROAD COMPANY AND OTHERS.

William B. Lent, John S. Davis, Charles B. Applegate, and Samuel H. Patterson, for answer to the complaint in this case, adopt the answer of their co-defendants, John P. Putnam and others, and say that the matters therein contained are true in manner and form as the same are therein alleged; when, &c.

DAVIS, *for Defendants.*

And the defendant Samuel H. Patterson files his separate answer to said complaint; which reads in the words and figures following, to wit:

In the Floyd circuit court, April term, 1863.

WILLIAM S. LINDLEY
vs.
SANDUSKY CITY JUNCTION RAILROAD COMpany and others.

Samuel H. Patterson, one of said defendants, for answer to said plaintiff's complaint in this suit, adopts the answer of his co-defendants, John G. Putnam and others, and says the matters therein contained are true in manner and form as the same are therein alleged. And in addition thereto the said defendant further says Mary M. Fitch, who is now living in this county, is interested by deed in the lands named in said mortgage, she having become a purchaser of part of said lands from one who purchased at said sale by said commissioner. A copy of said deed by said commissioner, and also a copy of said deed to said Fitch, will be filed herewith if required. This defendant, therefore, says that said Fitch should be made a defendant in this suit; wherefore, &c.

DAVIS, *Attorney for Def't.*

And the plaintiff files his demurrer to all the special defenses herein except so much of the answer of said defendant Patterson as avers that Mary M. Fitch has an interest in this suit, and ought to be made a party defendant hereto; which demurrer reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, Harvey Seymour, William S. Pierson, and others.

And the said plaintiff demurs to the answers of said Seymour, Pierson, Railroad Company, John P. Putnam, Samuel J. Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles A. Ely, Augustus H. Moss, Tho's L. Smith, Michael C. Kerr, Victor A. Pepin, John S. McDonald, W'm B. Lent, Charles B. Applegate, John S. Davis, Walter Mann, and others, and for cause, sets down—

1. That the same do not state facts sufficient to constitute a good defense to his said complaint.

J. AND A. B. COLLINS,
for Plaintiff.

128 And said demurrer is sustained by the court, and leave is given to amend said special defenses. And thereupon all the defendants, except James Montgomery, being before the court, this cause is ordered to be continued for process as to the said James Montgomery, with leave to plaintiff to amend his complaint by making Mary M. Fitch a party defendant hereto; and the defendant Cassandra Weir, sr., and George V. Howk, guardian ad litem, are ordered to answer the complaint on or before the calling of the cause at next term.

And afterward, to wit, at the April term of said Floyd circuit court, on the 26th day of April, 1864, comes the plaintiff by James and A. B. Collins, his attorneys, and files his affidavit herein, stating that this

action is in relation to real estate, and to enforce a lien; that William J. Parsons is a necessary party thereto; that a cause of action exists herein against him; and that said William J. Parsons is not a resident of the State of Indiana.

It is thereupon ordered by the court that the said William J. Parsons be notified, according to law, of the pendency of this action, and that the same will stand for trial at the next term of this court, to be holden at the court-house, in the city of New Albany, on the 4th Monday of October, 1864.

And afterwards, to wit, at the same term of said Floyd circuit court, on the 9th day of May, 1864, comes the plaintiff, and suggests to the court that no entry of the proceedings in this cause at the last term of this court can be found upon the order-book of this court; and, on his motion, it is ordered by the court that an entry be made nunc pro tunc as of the last term, and shewing such proceedings; and said entry is now made as follows, to wit:

No. 175, 4th day of the October term, 1863.

WILLIAM LINDLEY
vs.
N. A. AND S. C. J. R'ROAD COMPANY, WILLIAM S. Pierson, Harvey Seymour, and others.

Comes the plaintiff by J. and A. B. Collins, his attorneys, and it is shewn to the court, by the sheriff's return to the summons herein, that the same was personally served upon the defendants Mary M. Fitch and James Montgomery, more than ten days before the first day of the present term of this court. And it is suggested to the court that said Mary M. Fitch is an infant; thereupon George V. Howk, esqr., is appointed her guardian ad litem herein, and he is ordered to answer for said infant.

And the defendants William S. Pierson and Harvey Seymour, file an amended answer herein, and also file the exhibits referred to in said answer, and marked Nos. 1, 2, 3, and 4; Exhibits No. 5, in said answer not being filed. Said amended answer and exhibits read in the following words and figures, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, HARVEY SEYMOUR, AND others.

Said William S. Pierson and Harvey Seymour for their sep-
129 arate amended answer to the plaintiff's comp'aint herein say that at the October term of this court, in the year 1857, one Victor A. Pepin filed his complaint in this court against these defendants, together with the New Albany and Sandusky City Junction Railroad Company, James Montgomery, John S. Davis, William M. Weir, John S. McDonald, Thomas L. Smith, John B. Windstandley, Samuel H. Patterson, Charles Bowman, Charles Howard, and Sebra Howard, a copy of which

complaint, marked "Exhibit No. 1," is filed herewith, and made part hereof.

Said Pepin, in said complaint, averred that he was the owner and holder of seventeen of the bonds secured by the mortgage in the plaintiff's complaint in this suit mentioned, copies of which bonds were filed and made part of said complaint.

Said complaint further averred that said Montgomery, Lent, Davis, Smith, McDonald, Winstandley, Weir, Patterson, Bowman, Charles Howard, and Sebra Howard were the holders and owners of all the other bonds specified, amounting altogether, with those held by said Pepin, to the whole number of bonds issued, to wit, one hundred and ten, and prayed for the foreclosure of said mortgage and a sale of the mortgaged premises for the payment of the same. Said bonds and held by said Pepin, nor copies thereof, alleged in said complaint to be filed therewith, are not now on file in said court, and cannot be found, and copies thereof cannot now be furnished by these respondents.

But these respondents aver that all said bonds and coupons issued by said railroad company were in the same identical words and figures as those copies of which are furnished by the plaintiff in the present suit, except that they were numbered from No. 1 to Number 110, inclusive, and among the bonds so sued upon by said Pepin were the three identical bonds now sued upon. At the same October term of said court, in the year 1857, all of said defendants to the said suit of said Pepin appeared and filed their answers to said complaint, copies of which answers are also filed herewith, marked Exhibit No. 2.

And issues being joined on said complaint and answers, said court, at said term, rendered a judgment for the foreclosure of said mortgage and the sale of all said mortgaged property for the payment of the debts found to be due to the several holders and owners of said bonds.

A copy of said judgment, showing all the proceedings of the court in the premises, is filed herewith, Exhibits No. 3.

Afterwards the said Charles Frederick, the commissioner appointed by this court to make sale of said mortgaged premises, pursuant to said judgment, did, on the 30th of March, 1858, sell said premises, and at the April term of said court, in the year 1858, made his report, in writing, to said court, of the sale thereof, a copy of which report is filed herewith, marked Exhibits No. 4.

Afterwards, at the same term of said court last mentioned, said court approved and confirmed said sale, and ordered said commissioner to make conveyances to the purchasers of said mortgaged premises for the portions purchased by them respectively. A copy of said order of confirmation is also filed herewith, and marked Exhibit No. 5.

Said sale included all the property secured by said mortgage, and all of it was conveyed by said commissioner to the purchasers mentioned in his said report of sale, and all the proceeds of said sale, after payment of the costs and charges, were duly applied to the satisfaction of said several mortgaged debts specified in said judgment.

These respondents therefore say they have fully performed all
130 the duties of their said trust, and pray to be hence dismissed with their reasonable costs.

WILLIAM S. PIERSON and
HARVEY SEYMOUR,
By SMITH AND KERR,
Their Attorneys.

The exhibits referred to in this answer appear in the record of Victor A. Pepin vs. The New Albany and Sandusky City Junction Railroad Company, offered in evidence by complainants.

And the defendants John P. Putnam, Samuel T. Anderson, Sarah C. Day, Elijah Dewitt, George A. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith file their amended answer and cross-complaint herein, and also file Exhibit No. 7 mentioned in said answer, Exhibit No. 8 mentioned in said answer.

Said amended answer and cross-complaint, with "exhibits" filed therewith, read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
WILLIAM S. PIERSON, HARVEY SEYMOUR, John P. Putnam, and others.

Said John P. Putnam, Samuel T. Anderson, Elijah DeWitt, Rollin C. DeWitt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, for answer to the plaintiff's complaint, say that the matter stated in the answer of their codefendants William S. Pierson and Harvey Seymour, as amended herein, are true, and they adopt and make said answer a part of this answer of these respondents.

In addition to the matters stated in said amended answer of said Pierson and Seymour, these respondents say that at the sale made by said commissioner, pursuant to said judgment mentioned in said answer of their said codefendants, these respondents, apprehending that said mortgaged premises might be sacrificed for want of buyers at a reasonable price, entered into a written agreement with the persons therein named, empowering Michael C. Kerr and Victor A. Pepin to purchase at said sale such parts of said property as they should deem proper for the joint benefit of all the parties to said agreement. A copy of said agreement is filed herewith and marked Exhibit No. 7.

Pursuant to said agreement said Pepin and Kerr, as such trustees, did purchase at said sale certain portions of said mortgaged premises, and, pursuant to said order of said court confirming said sale, said commissioner executed to them a deed of conveyance therefor, which was duly examined and approved by said court.

A copy of said deed is filed herewith and marked Exhibit No. 8.

Afterwards, at the October term of this court, in the year 1858, one of these respondents, the said Herman Ely, instituted an action of partition against the other respondents herein and the other persons who were *who were* parties to the agreement shown by Exhibit No. 7, to obtain partition of the lands so purchased by said Pepin and Kerr as such trustees, and a decree was rendered by this court in said
131 action partitioning said lands amongst these respondents and the other parties named in said agreement. These respondents have applied to the clerk of said court for the files in said partition suit, but said clerk, after making diligent search of the records of the clerk's office of this court, found that they were not there on file and could not be found, and therefore copies thereof and of all the proceedings in said partition suit cannot be furnished by these respondants.

By said decree there were partitioned to the said Herman Ely, for the use and behoof of himself, John P. Putnam, Samuel T. Anderson,

Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Charles Arthur Ely, and Augustus H. Moss, as their proportion of said property, the following parts and parcels of the property described in said mortgage mentioned in the plaintiff's complaint herein, to wit:

The parts of lots Nos. 1 and 2, Lower Water street, New Albany, 25 feet front by 108 feet deep.

The lots in Day's Mount Isham plat, in the city of New Albany, numbered 43, 44, 45, 46, and 47, on Upper First street, and numbered 61, 62, 63, 64, and 65, on the old Vincennes road.

The lots in Noyes and Clynes' plat, in the city of New Albany, Nos. 41, 42, 43, 44, and 45, on Terry street.

The lots Nos. 1, 3, and 5, on Upper First street, in New Albany.

The tract of land known as the Wilcox Place, containing 20 acres 142 perches.

The lots in Moore's plat of Lower Albany, Nos. 10, 11, 15, 16, 17, and 18, on Jackson street.

The block No. 7, in the subdivision of the Whitehill tract in New Albany.

The part of lot No. 2, on Lower Water street, New Albany, being 25 feet in front by 108 feet deep.

The tract of land known as letter "C," on the map of the city of New Albany, containing 17 acres.

The lots in plat No. 20 of the city of New Albany, known as lots Nos. 30, 31, 32, and 33, on Elm st., and Nos. 25 and 26, on Shipping street.

The parts of lots Nos. 37 and 39, on Lower High street, being 39 feet front, and 90 feet deep.

The N. ½ of lot No. 27, on Upper First street, New Albany, being 25 feet in front by 120 feet deep, and the N. ½ of lot No. 2, on State street, in New Albany, being 25 feet in front by 120 feet deep.

By said decree there was also partitioned to the said Thomas L. Smith, one of these respondants, lots Nos. 12, on Jackson street, and No. 37, on Elm street, of Moore's plat of Lower Albany; and to the said Thomas L. Smith and William M. Weir, the north half of lot No. 8, on State street, in the city of New Albany.

The said William M. Weir, during his lifetime, sold his interest in said lot No. 8, on State street, to the Bank of the State of Indiana, for the use of the branch at Jeffersonville; and said Thomas L. Smith and said bank, and heirs of said William M. Weir, still hold said part of said lot as tenants in common, the said Thomas L. Smith being the owner of the one undivided half part thereof. All the other lands described in said Exhibit No. 8 were partitioned to the said James Montgomery, John S. Davis, John G. McDonald, William M. Weir, Samuel H. Patterson, Charles B. Applegate, William B. Lent, and Victor A. Pepin, or their representatives or assigns.

These representatives aver that the whole of the property
132 mortgaged by said railroad company to secure the payment of said bonds and coupons, as stated in the plaintiff's complaint herein, were not worth more than thirty-four thousand dollars, and was entirely insufficient to pay said bonds, which were one hundred and ten in number, for one thousand dollars each, with the coupons attached in addition thereto.

These respondants never received anything in payment of said railroad company, on account of the decree rendered by said court, as shown by Exhibit No. 3, filed with the answer of their codefendants Pierson and Seymour, except the lands herein aforesaid described, and the bal-

ance of said decree in their favor respectively remains wholly unpaid; and said railroad company is wholly insolvent, and has no property out of which said balance or any part thereof can be made.

These respondants further say that, at the time of the rendition of said decree, they filed in this court all of the said bonds, being fifty-eight in number, with the coupons attached, upon which said decree was rendered, in their favor respectively, and all of said bonds still remain on file in this court.

But the bonds owned by said Pepin, among which were the identical three bonds now sued upon, are not now on file in this court; and if the same have come to the hands of the present plaintiff, it has been by the negligence or fraud of said Pepin, and not from any negligence or fraud by these respondants.

The respondants aver that they acquired said portions of said mortgaged premises, so partitioned to them respectively as aforesaid, in good faith, and for a full and valuable consideration, and without any notice whatever of the claim of the plaintiff in this action to any of the bonds secured by said mortgage.

They claim that if any of said mortgaged property should be subjected to the payment of said bonds in the hands of the plaintiff, it should be the property acquired by said Pepin or his assigns.

These respondants further aver that the bonds which at the time of said decree were owned and held by said Montgomery, Davis, McDonald, Weir, Patterson, Applegate, and Lent, and upon which said decree was rendered in their favor respectively, are not now on file in this court, and if they were filed, have been since withdrawn from the custody of this court, and may get into the hands of parties who will again claim the payment thereof.

The respondants make this answer a cross-complaint against the plaintiff and their said co-defendants, and pray they may be severally required to answer hereto; and these respondants further pray that on the final hearing hereof, they may be dismissed with their reasonable costs; and that the plaintiff and their said co-defendants be required to produce and file the said bonds upon which said decree was rendered in this court, in order that the same may be cancelled and prevented from being again put in circulation, and in default thereof, that all claims of any person or persons into whose hands any of said bonds may come, be ordered to be satisfied out said portions of said mortgaged property acquired by said owners of said bonds which have been thus wrongfully put in circulation.

They also pray for all other proper relief.

SMITH AND KERR,
P. Resp'ts.

The defendant John S. McDonald files a further answer and cross-complaint; which reads in the words and figures following, to wit:

133 Floyd circuit court.

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY RAILROAD COMpany and others.

John S. McDonald answers the complaint herein, and denies all the allegations therein contained; and, by way of cross-complaint against the plaintiff and his co-defendants, the said McDonald says that he is

the owner and holder of the bonds mentioned in the mortgage described, numbered 57, 58, 59, 60, 61, together with the interest warrants thereto attached, which said bonds and warrants are now due and wholly unpaid, and are herewith filed and made part hereof.

Where*of* the said McDonald prays judgment for ten thousand dollars, the foreclosure of said mortgage, and the sale of the real estate therein described, or so much as may be necessary to satisfy the debt of said McDonald, and all other proper relief.

R. CRAWFORD AND SON,
Attorneys for McDonald.

The bonds and warrants mentioned in said answer and cross-complaint read in the words and figures following, to wit:

(The bonds numbers 58, 59, 60, and 61, are the same as No. 57, with the exception of the numbers.)

The defendant James Montgomery, appears by Howk and Weir, his attorneys, and files his answer and cross-complaint. Said answer and cross-complaint reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE SANDUSKY CITY JUNCTION RAILROAD Company and others.

Said James Montgomery, seperately answering the complaint herein, says that he denies specifically each and every allegation contained in said complaint.

2nd. And by way of cross-complaint against the plaintiff and his co-defendants herein, said Montgomery says he is the holder and owner of six (6) of the real-estate bonds mentioned in and secured by the mortgage described in said complaint, and the coupons or interest-warrants attached to said bonds, all of which remain unpaid.

Said bonds are respectively numbered 44, 45, 46, 47, 48, and 108, and are herewith filed and made part hereof.

Wherefore said James Montgomery, demands judgment for ten thousand dollars, and the foreclosure of said mortgage, and the sale of the property or so much thereof as may be necessary to pay his debts, and for all other proper relief.

HOWK AND WEIR,
Attorneys for Montgomery.

The bonds and warrants mentioned in said answer and cross-complaint read in the words and figures following, to wit:

134 (The bonds numbers 45, 46, 47, 48, and 108, are the same as No. 44, with the exception of the numbers.)

The defendant Robert M. Weir, adm'r, appears by Howk and Weir, his attorneys, and files his answer and cross-complaint; which reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company et al.

Robert M. Weir, administrator of the estate of William M. Weir, de-

ceased, seperately answering the complaint herein, says that he denies specifically each and every allegation in said complaint contained.

2nd. And, by way of cross-complaint against the plaintiff and his co-defendants herein, said Robert M. Weir says that, as such administrator, he is the holder and owner of five (5) of those real-estate bonds mentioned and secured by the mortgage described in plaintiff's complaint and of the coupons or interest-warrants attached to said bonds; all of which remain unpaid.

Said bonds are numbered 62, 63, 64, 65, and 66, and are herewith filed and made part hereof.

Therefore, said Robert M. Weir, administrator as aforesaid, demands judgment for eight thousand five hundred dollars, and the foreclosure of said mortgage, and the sale of the property, or so much thereof as may be necessary to pay his debts, and all other proper relief.

HOWK AND WEIR,
Attorneys for said Weir.

The bonds mentioned in the above answer and cross-complaint read in the words and figures following, to wit:

(The bonds numbers 63, 64, 65, and 66 are the same as No. 62, with the exception of the numbers.)

And the defendants Sarah A. Weir, Samuel R. Weir, Mary A. Weir, John S. Weir, and Susan C. Weir appear by George V. Howk, their guardian ad litem, and file their answer; which answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company et al.

The defendants Sarah A. Weir, Samuel R. Weir, Mary R. Weir, John S. Weir, and Susan C. Weir, who are infants under the age of twenty-one years, by George V. Howk, their guardian ad litem, answer the complaint herein, and say that they deny specifically each and every allegation of said complaint prejudicial to their interests.

GEORGE V. HOWK,
Guardian ad litem.

135 The defendant Cassandra Weir appears by Howk and Weir, her attorneys, and files her seperate answer; which answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company and others.

Said Cassandra Weir, seperately answering the complaint herein, says that *that* she denies specifically each and every allegation of said complaint.

2nd. And, for further answer herein, the said Cassandra Weir says that Jacob Goodfried, John M. Leib, David H. Cadwalader, Howell Wells, William P. Swift, A. E. S. Smith, Madison Royer, James Lucas, Morris McDonald, William J. Parsons, John E. Noyes, Michael Clynes, Morris Demoor, John C. Culbertson, Simpkins Love, Caroline Love, John B. Jones, The Bank of the State of Indiana, for the use of the branch at Jeffersonville, were, at and before the commencement of this action, and are still, the owners in fee simple of divers parts of the premises described in the mortgage mentioned in plaintiff's complaint by deeds duly recorded in the recorder's office of the county in which said mortgaged premises are situate before the commencement of this action; that the said several persons have an interest in the subject-matter of this controversy adverse to the plaintiff; and that they are necessary parties to a complete determination and settlement of the questions involved in this action.

Wherefore this defendant asks that the several persons herein named may be made parties defendant to this action, and other proper relief.

HOWK AND WEIR,
Attorneys for Cassandra Weir.

The defendant Henry Crawford files his answer and cross-complaint; which reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Railroad Co. and others.

Henry Crawford answers the complaint and admits all the allegations therein contained to be true.

2. And, by way of cross-complaint against the plaintiff and his co-defendants, said Crawford says that he is the owner and holder of 16 of the bonds in the mortgage in the complaint described, numbered 67, 68, 69, 70, 71, 24, 25, 26, 27, 28, 110, 43, 54, 55, 56, 109, together with the interest warrants thereto attached; which bonds and interest warrants are now due and unpaid, and are herewith filed and made part hereof.

Wherefore the said Crawford prays judgment for twenty-five thousand dollars, the foreclosure of said mortgage, and the sale of the real estate therein described, or so much as may be neeessary to satisfy the debt of said Crawford, and all other proper relief.

R. CRAWFORD AND SONS,
Attorneys for H. Crawford.

136 The bonds and warrants mentioned in the foregoing answer and cross-complaint read in the words and figures following, to wit:

(The bonds numbers 68, 69, 70, 71, 24, 25, 26, 27, 28, 110, 43, 54, 55, 56, and 109, are the same as No. 67, with the exception of the numbers.)

The defendants Lent, Patterson, Davis, and Applegate, file their answer and cross-complaint; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE SANDUSKY CITY JUNCTION RAILROAD Company and others.

Said William B. Lent, Samuel H. Patterson, Charles B. Applegate, and John S. Davis, defendants herein, by way of amended answer herein to the complaint of said plaintiff, say that they adopt the amended answer of their co-defendants, John P. Putnam and others, and state that the matters therein contained are true in manner and form as the same are therein alleged.

And said defendants further state that John B. Jones, who resides in the city of Pittsburgh, P'a, and who is now living; Sarah Spurrier, who is the wife of George B. Spurrier, and who resides in Floyd County, in the State of Indiana; and the Ohio Insurance Company, of which company James M. Haines has been duly appointed receiver, and who resides in Floyd County, are interested in said lands named in the mortgage referred to in said plaintiff's complaint, said parties having respectively become the purchasers of parts of said lands, and have deeds therefor, and they are necessary parties to this suit, &c.

JOHN S. DAVIS,
Att'y "for Def'ts."

And the said plaintiff and defendants are ordered respectively to answer each of said cross-complaints.

The defendant William B. Lent files his answer to the cross-complaint of Henry Crawford; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company and others.

William B. Lent, one of the defendants to the cross-complaint of Henry Crawford, says:

First. That he denies the matters contained in said cross-complaint, and every part thereof.

Second. And, by way of further and second paragraph herein, said defendant says that the mortgage named in said plaintiff's complaint was, at the October term of this honorable court for the year 1857,
137 for'closed for the purpose, in part, of paying the bonds named in said Crawford's complaint in a certain suit wherein one Victor A. Pepin was plaintiff, and William S. Pierson and Harvey Seymour and others were defendants; that in said suit the holders and owners of said bonds, to wit, Charles B. Applegate, John S. Davis, and this defendants, interposed seperate answers to said complaint of said Pepin, setting up the bonds, respectively held and owned by them, being the same bonds now filed by said Crawford; and such proceedings were had, in said case in said court, that, by consideration of said court, judgment was rendered upon said bonds, with the other bonds issued by said company, and said mortgaged property was ordered to be sold

by said court, in part, to pay the identical bonds in said Crawford's complaint mentioned, and Charles Frederick was appointed by the order of said court, in said case, a commissioner to make sale of said mortgaged property; and said commissioner did make sale of said property, and sundry parties became purchasers thereof at said sale; and deeds were made to said parties for the lands by them purchased; all of which was afterwards reported to said courts, and was, in all things, by said court, approved and affirmed.

A copy of the judgment of said court, also a copy of the report of said commissioner, and the order of said court confirming the same, are filed herewith and made part hereof.

Said defendant further states that it appears that said bonds were not actually placed in the hands of the clerk of this court, but a description thereof was given, together with the numbers of said bonds, and for safety said bonds were left in the vault of the Ohio Insurance Company, in the case of one Charles B. Applegate, who was the secretary of said company, to be by him handed to the clerk of this court when the judgment should be rendered upon said bonds; that the amount of each bond was furnished to said court, and judgment was taken as hereinbefore stated, upon said bonds, and, through some error or forgetfulness of said Applegate, said bonds were permitted to remain in said vault of said Ohio Insurance Company until said company suspended business, when, by some process unknown to this defendant, said bonds got into the hands of said Crawford, and are now in his possession, and are filed with his cross-complaint. Defendant states that said Crawford was well aware that said mortgage had been foreclosed, in part, to pay the identical bonds now named in his complaint, and that the lands described in said mortgage had been sold, in part, to pay said bonds, and that said bonds rightfully belonged to the files in this court in said case of Victor A. Pepin against William S. Pearson, Harvey Seymour, and others; and that said Applegate, Davis, and this defendant had no right to said bonds, or any of them, as said bonds had been used in said suit as above stated.

Defendant further states that himself, said Davis, and said Applegate, under said sale and certain other proceedings afterwards had, became the owners of a certain part of the real estate named in said mortgage, all of which has been long since sold to innocent purchasers, of all which said Crawford had notice.

And defendant further states that, in case the proceedings of said Lindley herein should *should* be successful, said bonds ought to be held in good faith for the use and benefit of the innocent purchasers of said lands from defendant' Applegate and Davis.

And the defendant makes this his answer herein a cross-complaint against said Crawford, and prays that he may be required to
138 answer the same, and that he be required to give up and surrender said bonds to the clerk of this court, that they may be filed with the other papers and files in the case of said Victor A. Pepin against William S. Pierson, Harvey Seymour, and others, where said bonds rightfully belong; and said defendants asks for all other and proper relief in the premises.

WILLIAM B. LENT,
By JOHN S. DAVIS, *His Attorney.*

(The copy of the judgment, report of commissioner, and order of the court confirming the same, filed with the foregoing answer, cannot be found amongst the files.)

The plaintiff files his seperate demurrers to the answer of the defendants Pepin; the first answer of McDonald and Mann; the seperate answer and cross-complaint of Henry Crawford; the amended answer of Pierson and Seymour; the answer and cross-complaint of Lent, Patterson, Applegate, and Davis; and the amended answer and cross-complaint of John P. Putnam, and the ten others who answer with him. Said demurrers read in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
N. A. S. C. J. R. R. CO., VICTOR A. PEPIN, and others.

And the said plaintiff demurs to the answer of Victor A. Pepin, and for cause—

1. That the same does not set forth matters sufficient to constitute a good defense against his said complaint.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

WILLIAM LINDLEY
vs.
THE N. A. AND S. C. J. R. R. CO., JOHN S. McDONALD, and WALTER MANN and others.

And the said demurrer to the answer of John S. McDonald and Walter Mann, and for cause—

1. That the same does not set forth matter sufficient to constitute a good bar to the plaintiff's cause of action.

J. AND A. B. COLLINS,
Attorneys for Plaintiffs.

WILLIAM LINDLEY
vs.
THE N. A. AND S. C. J. R. R. CO., THOMAS L. Smith, John S. McDonald, and others.

And the said plaintiff, as to the answer of John S. McDonald, demurs thereto, and for cause—

1. That said answer does not contain matter sufficient to bar the plaintiff herein.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

139 WILLIAM LINDLEY
vs.
THE N. A. AND S. C. J. R. R. CO., W'M S. Pearson, and Harvey Seymour and others.

And the said plaintiff, as to the amended answer of said Piarson and Seymour, demurs thereto, and for cause—

1. That the same does not contain matter sufficient to constitute a good defense against his complaint herein.

J. AND A. B. COLLINS,
Att'ys for Pl'ffs.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company, William S. Pierson, John S. Davis, William B. Lent, and others.

And the said plaintiff, as to so much of the answer of said W'm B. Lent, Samuel H. Patterson, Charles B. Applegate, John S. Davis as adopts the answer of John P. Putnam and others, demurs thereto, and for cause—

1. That said part of said answer does not contain matter sufficient to bar this plaintiff of his said action.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

WILLIAM LINDLEY
vs.
JOHN P. PUTNAM, SAMUEL J. ANDERSON, Sarah C. Day, and others.

And, as for the answer, amended answer, and cross-complaint of John P. Putnam, Samuel Anderson, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, as also the answer of Michael C. Kerr and The New Albany and Sandusky City Junction Railroad Company, the said plaintiff demurs, and for cause—

1. That the same do not contain matter sufficient to constitute a good defense to the said plaintiff's complaint.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

And thereupon this cause is ordered to be continued with leave to plaintiff to amend his complaint by making new parties defendant.

And here ends the nunc-pro-tunc order for October term, 1861.

And afterwards, to wit, at the April term of sard Floyd circuit court, on the 9th day of May, 1864, comes the plaintiff by his counsel, and shows to the court that since the last term he has amended his complaint by making Jacob Godfried, John M. Leib, David H. Cadwalader, Howell Wells, William P. Swift, A. , E. L. Smith, Madison Royer, James Lucas, Morris McDonald, William J. Parsons, John E. Noyes, Michael Cynes, William Demar, John C. Culbertson, Simpkins Love, Caroline Love, John B. Jones, Sarah Spurrier, George B. Spurrier,
James M. Haines, receiver of the Bank of the State of Indiana,
140 for her Jeffersonville branch, and John Sloan parties defendant hereto; and that he has further amended by averring the death of said John M. Leib and making his children and heirs at law parties defendant, to wit, Margaret Leib, and Wilhelmina, Mary Ann, Matilda, John M., Elias, Elizabeth, and Oscar Leib defendants hereto.

And it is shown to the court by the sheriff's return that all of said heirs and representatives were personally served with the summons herein more than ten days before the first day of the present term of this court, and that they are all infants except Margaret Leib, Wilhelmina Leib, and Mary Ann Leib, and said defendants, the Leibs, fail to

appear; and thereupon the complaint herein is taken as confessed against the said Margaret, Wilhelmina, and Mary Ann, and George V. Howk is appointed guardian ad litem for the said Matilda, John M., Elias, Elizabeth, and Oscar, and is ordered to answer.

And it is shown to the court that all of the other defendants made parties to by said amendment since last term have been personally served with the summons herein more than ten days before the first day of the present term of this court.

Thereupon the demurrers filed by the plaintiff to the answers and cross complaint at the last term of this court are submitted to the court, and said demurrers are overruled, and to the decisions of the court overruling said demurrers the plaintiff excepts.

Thereupon the plaintiff files his reply to the answer of the defendant Pepin, with interrogatories to be by him answered under oath; which reads in the words and figures following to wit:

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY J. R. R. Co., Victor A. Pepin, Harvey Seymour, and others.

And, for reply to the special answer of said Pepin, said plaintiff says he denies each material allegation thereof.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

Interrogatories put by said plaintiff to said Pepin, to be by him answered under oath.

1. Are you the same Victor A. Pepin who was plaintiff in a proceeding in the Floyd circuit court, in the State of Indiana, to enforce a mortgage or trust-deed against Harvey Seymour, W'm S. Pierson, and the New Albany and Sandusky City Junction Railroad Company, and others?

2. When you commenced that proceeding, did you have in your possession, or under your control, or were you the owner of, three of the bonds of said railroad company, numbered 4, (four,) 5, (five,) and 7, (seven,) with the interest warrants attached; or were you the owner thereof, or had you then your possession, or under your control at any time since, or had you then in court at the hearing of said cause?

3. Had you, previously to commencing your suit to enforce the collection of the bonds you held, any knowledge of any of said bonds being in the possession of and owned by William Lindley, the plaintiff? And, if you had, please furnish the numbers if you can.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

141 And the defendant David H. Calwalader, appears by D. W. Lafallette, his attorney, and is ordered to answer. And the plaintiff files his affidavit for publication as to William J. Parsons; and thereupon publication is ordered to be made as to the said William J. Parsons by the clerk of this court, and the defendant Pepin is ordered

to answer said interrogatories on or before the next calling of this cause at next term, until which time this cause is ordered to be continued.

And afterwards, to wit, at the October term of said Floyd circuit court, on the 5th day of November, 1864, come now the parties heretofore appearing in the cause, and William J. Parsons, by Smith and Kerr, his attorneys, and on motion he is ordered to answer the plaintiff's complaint herein.

And thereupon said Parsons filed his answer herein; which reads in words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY JUNCTION R. R. Co. et al.

William J. Parsons, one of the defendants herein, says he is the owner of lots numbered 43, 44, 45, 46, and 47, in Day's Mount Isham plat; also lots numbered 61, 62, 63, 64, and 65, in the same plat; also lots numbered 10, 11, 15, 16, 17, and 18, on Jackson street, in N. Moore's plat of Lower Albany, all in the city of New Albany, and all being a portion of the lands covered by the mortgage in the plaintiff's complaint mentioned.

This defendant purchased all of said property of his co-defendants, John P. Putnam and others, long after the rendition of the decree, and the sale of the same under the execution issued thereon mentioned in the answers of Harvey Seymour, William S. Pierson, and John P. Putnam and others, filed in this suit for a full and valuable consideration, and without any notice of the matters mentioned in the plaintiff's complaint, and in the full belief that his said codefendants had obtained a good title thereto by said decree and sale. He adopts the answers of his codefendants herein to the complaint of the plaintiff as fully and completely as if the facts therein contained were now herein repeated and set out, and avers that all said facts are true.

And having thus fully answered, he prays that his rights be protected and that he be hence dismissed with his reasonable costs.

WILLIAM J. PARSONS,
By SMITH AND KERR, *His Att'ys.*

And on his motion a rule is awarded against the plaintiff to reply thereto.

And Virgil D. Stockbridge files his answer and cross-complaint herein; which reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY RAILroad Co. and others.

1. Virgil D. Stockbridge answers the complaint of the plaintiff, and admits all the allegations therein contained to be true.

142 2. And, by way of cross-complaint against the plaintiff and his codefendants, said Stockbridge says that he is the owner and holder of 14 of the bonds described, numbered 1, 2, 3, 6, 8, 9, 10, 11, 13,

19, 20, 21, 22, 23, together with the interest warrants thereto attached, which bonds and interest warrants are now due and unpaid, and are herewith filed and made a part hereof.

Wherefore the said Stockbridge prays judgment for twenty-five thousand dollars, the foreclosure of said mortgage, and the sale of the real estate therein described, or so much as may be necessary to satisfy the debt of said Stockbridge, and all other proper relief.

R. CRAWFORD AND SONS,
Attorneys for Virgil D. Stockbridge.

The bonds and interest-warrants mentioned in the foregoing answer and cross-complaint read in the words and figures following to wit:

(The bonds numbers 2, 3, 6, 8, 9, 10, 11, 13, 19, 20, 21, 22, and 23, are the same as number 1, with the exception of the numbers.)

And on his motion a rule is awarded against the plaintiff and the several codefendants of said Stockbridge to answer said cross-complaint, and Mary M. Fitch, by her guardian ad litem, files her answer herein; which answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, William S. Pierson, Harvey Seymour, et al.

Said Mary M. Fitch, an infant under the age of twenty-one years, by George V. Howk, her guardian ad litem, seperately answers the plaintiff's complaint, and says that she denies specifically each and every allegation in said complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian ad litem, answers the cross-complaint of Henry Crawford, on file herein, and says that she denies specifically each and every allegation in said cross-complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian, seperately answers the cross-complaint of Robert M. Weir, administrator of the estate of William M. Weir, deceased, on file herein, and says that she denies each allegation in said cross-complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian, seperately answers the cross-complaint of James Montgomery, on file herein, and
143 says that she denies specifically each allegation in said cross-complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian, seperately answers the cross-complaint of John S. McDonald, on file herein, and says that she specifically denies each allegation in said cross-complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And said Mary M. Fitch, by her said guardian, seperately answers the cross-complaint of Virgil D. Stockbridge, on file herein, and says that she denies specifically each allegation in said cross-complaint contained which is prejudicial to her interests.

GEORGE V. HOWK,
Guardian ad litem.

And on her motion a rule is awarded against the plaintiff and all cross-complainants to reply thereto. And the infant defendants Wilhelmina Leib, Mary Ann Leib, Matilda Leib, John M. Leib, Elias Leib, Elizabeth Leib, and Oscar Leib, by George V. Howk, their guardian ad litem, files their answer to the complaint herein and all the cross-complaints; said answer reads in the following words and figures, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company and others.

The said Wilhelmina Leib, Mary Ann Leib, Matilda Leib, John W. Leib, Elias Leib, Elizabeth Leib, and Oscar Leib, by George V. Howk, their guardian ad litem, for answer to the plaintiff's complaint, and all the cross-complaints filed herein, say that they deny each and every material allegation in said complaint and in said cross-complaints, and demand strict proof thereof.

GEORGE V. HOWK,
Guardian ad litem for Infant Heirs of John M. Leib.

And the infant defendants Sarah A. Weir, Susannah R. Weir, Mary R. Weir, John S. Weir, and Susan C. Weir, by George V. Howk, esq'r, their guardian ad litem, file their answer to all the cross-complaints herein; said answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company and others.

The said defendants Sarah A. Weir, Samuel R. Weir, Mary R.
144 Weir, John S. Weir, Susan C. Weir, by George V. Howk, their guardian ad litem, for answer to all the cross-complaints filed herein, say that they deny each and every material allegation in said cross-complaints prejudicial to their interests.

GEORGE V. HOWK,
Guardian ad litem for Infant Heirs of W'm M. Weir.

These parties, Sam'l I. Kelley, Simkins Love and Caroline Love, John B. Jones, Geo. B. Spurrier & wife, respectively filed their answers, but the same not being deemed material in this cause are omitted by consent of parties from this record.

And the defendant, D. H. Cadwalader, files his answer to the complaint, and his answer to all cross-complaints; said answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY Junction Railroad Company et al.

David H. Cadwalader seperately answers the plaintiff's complaint and all cross-complaints on file in this action, and says that he specifically denies each and every allegation in said complaint and cross-complaint, or either of them, contained.

2nd. And, for further answer to said complaint and cross-complaint, said Cadwalader says that he adopts the amended answer of his co-defendants William S. Pierson and Harvey Seymour as a part of this answer, and avers that the matters stated in said amended answer are true.

And this defendant further says that, at the sale mentioned in said Pierson and Seymour's amended answer, he became the purchaser of that portion of the premises described in the mortgage mentioned in plaintiff's complaint, which is known as thirty acres of the east half of the southeast quarter of section 33, in township 2 south, of range 6 east, in Floyd County, Indiana, for the sum of $540 00, which was the full value thereof at that time, and in its then condition; that said sale to this defendant was afterwards approved and confirmed by this honorable court; and that said premises were conveyed to this defendant by deed duly executed, a copy of which is filed herewith and made part hereof.

And this defendant says that he took immediate possession of said premises under his said deed, and has ever since owned and held the same; and that he has made valuable and lasting improvements on said premises, whereby the value of said premises has been largely increased, and they are now fairly worth not less than $3,000 00.

And this defendant further says that he acquired his title to the said premises in the manner aforesaid, without any notice whatever of any of the matters alleged in the plaintiff's complaint, or in any of the said cross-complaints on file herein; and he avers and charges that the plaintiff and his codefendants had notice of all the matters alleged in said Pierson and Seymour's amended answer, at the times of their several occurrences; and that innocent parties were acquiring interests in the said mortgaged premises, and making valuable and lasting
145 improvements thereon, with the full belief that all the proceedings mentioned in said amended answer were, as they appear to be, regular and valid. And yet the plaintiff, and the defendants who have filed cross-complaints herein, did not, nor did either of them, for a long time, to wit, for five years, assert or endeavor to enforce any claim under said mortgage, although during all of said time, as they and each of them well knew, the said New Albany and Sandusky City

Junction Railroad Company was notoriously insolvent and utterly unable to pay her debts.

Wherefore this defendant asks that his rights in the premises may be protected by the decree of this honorable court, and that he may have all proper relief.

LAFALLETTE AND HOWK,
For Cadwalader.

And the plaintiff is ordered to reply to said answer. And the defendants William B. Lent, Samuel H. Patterson, John S. Davis, and Charles B. Applegate file their joint answer to the cross-complaint of John S. McDonald, with interrogatories to said McDonald. Said answer and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1864.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION R. R. Co. et al.

William B. Lent, Samuel H. Patterson, John S. Davis, and Charles B. Applegate, for answer to the cross-complaint of John S. McDonald filed herein, say:

First. That they deny each and every thing in said complaint contained.

Second. And, for further answer to said cross-complaint, defendants, and each of them, say that the matter and things stated in the answer of their codefendants Pierson and Seymour, and in the answer of John P. Putnam and others, to the complaint of the plaintiff in this suit, are true, and they here repeat the averments therein contained in answer to said cross-complaint of said McDonald as fully and completely as if the same were herein set forth and repeated.

And, in addition to the facts contained in said answer to plaintiff's complaint, defendants further say that the bonds mentioned in said cross-complaint are the identical same bonds used and sued upon by said McDonald, in said former foreclosure suit of Victor A. Pepin against the New Albany and Sandusky City Junction Railroad Company and others, and that judgment was rendered in said former suit in favor of said McDonald upon all of said bonds in said cross-complaint mentioned, and that said bonds now belong to the files in said former suit.

And said defendants further say that said mortgage having been foreclosed to pay said bonds, and judgment having been taken thereon in favor of said McDonald, he has no right to use them in this suit.

Wherefore, and C.

JOHN S. DAVIS,
Attorney for Def'ts.

146 And said McDonald is ordered to answer said interrogatories on or before the next calling of this cause, and the same defendants last named file their joint answer to the cross-complaint of James Montgomery, with interrogatories. Said answer and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1864.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

William B. Lent, Samuel H. Patterson, John S. Davis, and Charles B. Applegate, for answer to the cross-complaint of James Montgomery, filed herein, say:

First. That they deny each and every matter and thing in said complaint contained.

Second. And, for further answer to said cross complaint, defendants, and each of them, say that the matter and things stated in the answer of their co-defendants Pierson and Seymour, and in the answer of John P. Putnam and others, to the complaint of the plaintiff in this suit, are true, and they here repeat the averments therein contained in answer to said cross-complaint of said Montgomery as fully and completely as if the same were herein set forth and repeated.

And, in addition to the facts contained in said answers to plaintiff's complaint, defendants further say that the bonds mentioned in said cross-complaint are the identical same bonds used and sued upon by said Montgomery in said former foreclosure suit of Victor A. Pepin against the New Albany and Sandusky City Junction Railroad Company and others, and that judgment was rendered in said former suit in favor of said Montgomery upon all of said bonds in said cross-complaint mentioned, and that said bonds now belong to the files in said former suit.

And said defendants further say that said mortgage having been foreclosed to pay said bonds, and judgment having been taken thereon in favor of said Montgomery, he has no right to use them in this suit.

Wherefore, and C.

JOHN S. DAVIS,
Att'y for Def'ts.

And the defendant Robert M. Weir, administrator, files his answer to all the cross-complaints herein except his own. Said answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company et al.

Said Robert M. Weir, administrator of the estate of William M. Weir, deceased, answers all the cross-complaints on file herein except his own, and says he denies specifically each and every allegation in said cross-complaints, or either of them, contained.

HOWK AND WEIR,
Att'ys for said Weir.

147 And the defendant James Montgomery files his answer to all the cross-complaints herein except his own. Said answer reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Co. et al.

Said James Montgomery answers all the cross-complaints on file herein except his own, and says that he denies specifically each and every allegation in the said cross-complaints, or either of them, contained.

HOWK AND WEIR,
Attorneys for Montgomery.

And the defendants John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith file their joint answer to the cross-complaint of Robert M. Weir, administrator, with interrogatories to said Weirs. Said answers and interrogatories read in the words and figures, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Co. and others.

Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Herman Ely, Charles *Atkins* Ely, Augustus H. Moss, and Thomas L. Smith, for answer to the cross-complaint of their co-defendant Robert M. Weir, administrator of the estate of William M. Weir, deceased, says:

1st. They speci'ally deny each and every averment in said cross-complaint.

2nd. And, for further answer to said cross-complaint, the defendants, and each of them, say that the matters and things stated in the answer of their co-defendants Pierson and Seymour, and in the answers of their defendants to their complaint of the plaintiff in this suit, are true, and they here repeat the averments therein contained in answer to said cross-complaint of said Weir as fully and completely as if the same were here repeated.

And, in addition to the facts stated in said answer to the plaintiff's complaint, these defendants further say that the bonds in said cross-complaint mentioned are the same identical bonds owned and used by the said William M. Weir, the plaintiff's intestate, in said former suit of foreclosure, and upon which he obtained judgment of foreclosure in said suit, and execution, and sale of said mortgaged premises, and received his proportion of the proceeds of such sale.

After said judgment was obtained, said bonds were placed by the counsel of said William M. Weir in the office or custody of the Ohio Insurance Company for safe-keeping, and, if they were not filed
148 in this court or cancelled, it was his own fault, or the fault of his counsel, not the fault of these defendants.

Said William M. Weir, at the time said former suit was pending, was living, and was a member of the board of directors of said railroad

company, and had full knowledge of all the proceedings had in said suit; and, if his administrator now has possession of the bonds in his cross-complaint mentioned, he obtained them fraudulently and with full knowledge of the foregoing facts.

SMITH AND KERR,
Attorneys for Respondants.

And the same defendants last named file their joint answer to the cross-complaint of Virgil D. Stockbridge, with interrogatories to him. Said answer and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Co. and others.

Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus M. Moss, and Thomas L. Smith, for answer to the cross-complaint of Virgil D. Stockbridge filed herein, say:

1st. They specifically deny each and every averment in said cross-complaint.

2nd. For further answer to said cross-complaint, these defendants, and each of them, say that the matters and things stated in the answer of their co-defendants Pierson and Seymour, and in the answers of these defendants to the complaint of plaintiff in this suit , and they here repeat the averments therein contained in answer to said cross-complaint of said Stockbridge fully and completely as if the same were here repeated.

And, in addition to the matters stated in said answers to the plaintiff's complaint, these respondants further say that all of the bonds in said cross-complaint mentioned are a portion of the same identical owned and used by said Victor A. Pepin in said former suit of foreclosure, and upon which he obtained judgment in the said former suit, and execution, and sale of said mortgaged premises, and received his proportion of the proceeds of such sale.

After said judgment was obtained, said bonds were placed by the counsel of said Pepin in the office or custody of the Ohio Insurance Company for safe-keeping, and if they were not filed in this court or cancelled it was the fault of said Pepin, and not the fault of these defendants. If said Stockbridge now has possession of the said bonds in his said complaint mentioned, he obtained them after said former judgment had been rendered upon them, and after all said mortgaged property had been sold under judgment in said former suit fraudulently and with full knowledge of the facts aforesaid.

SMITH AND KERR,
Attorneys for the Respondants.

149 And he is ordered to reply to said answer and to answer said interrogatories on or before the next calling of this cause.

And the same defendants file their joint answers to the cross-complaint of James Montgomery, with interrogatories to him.

Said answers and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. DeWitt, George B. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus M. Moss, and Thomas L. Smith, for answer to the cross-complaint of their co-defendant James Montgomery, say:

1st. They specifically deny each and every averment in said cross-complaint.

2nd. And for further answer to said cross-complaint, the defendants and each of them say, that the matters and things stated in the answer of codefendants Pierson and Seymour, and in the answers of these defendants to the complaint of the plaintiff in this suit, are true, and they here repeat the averments therein contained in answer to said cross-complaint of said Montgomery as fully and completely as if the same were here repeated.

And, in addition to the facts stated in said answers to the plaintiff's complaint, these defendants further say that said bonds in said cross-complaint mentioned are the same identical bonds filed by him in said former suit of foreclosure, and upon which he obtained judgment of foreclosure in said suit, and execution and sale of said mortgaged premises, and received his proportion of the proceeds of said sale.

After said judgment was obtained said bonds were placed by the counsel of said Montgomery in the office of the Ohio Insurance Company for safe-keeping, and if they were not filed in this court and cancelled it was his own fault, or that of his counsel, and not the fault of those defendants.

Said Montgomery was, at the time said former suit was pending, president of said New Albany and Sandusky City Junction Railroad Company, and had full knowledge of all the proceedings connected with said suit, and if he now has possession of the bonds in his cross complaint mentioned he must have obtained them surreptitiously and fraudulently.

SMITH AND KERR,
Attorneys for said John P. Putnam and others.

And he is ordered to reply to said answer and to answer said interrogatories on or before the next calling of this cause.

And the same defendants their joint answer to the cross-complaint of John S. McDonald, with interrogatories to him.

Said answer and interrogatories read in the words and figures following, to wit:

150 In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND S. C. J. R. CO. AND others.

Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De

Witt, Rollin C. DeWitt, George B. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus M. Moss, and Thomas L. Smith, for answer to the cross-complaint of their co-defendant, John S. McDonald, say:

1st. That they specifically deny each and every averment in said cross-complaint.

2nd. And, for further answer to said cross-complaint, these defendants and each of them say that the matters and things stated in the answer of their codefendants Pierson and Seymour, and in the answers of these defendants to the complaint of the plaintiffs in this suit, are true, and they here repeat the averments therein contained, in answer to said cross-complaint of said McDonald as fully and completely as if the same were here repeated.

And, in addition to the facts stated in said answers to the plaintiff' complaint, these defendants further say that said bonds in said cross-complaint mentioned are the same identical bonds owned and used by him in said former suit of foreclosure, and upon which he obtained judgment of foreclosure, and execution of sale of said mortgaged premises, and received his proportion of the proceeds of said sale.

After said judgment was obtained, said bonds were placed by the counsel of said McDonald in the office or custody of the Ohio Insurance Company for safe-keeping, and, if they were not filed in this court and cancelled, it was his own fault, or the fault of his counsel, and not the fault of these defendants.

Said McDonald, at the time said former suit was pending, was a member of the board of directors of said railroad company, and had full knowledge of all the proceedings connected with said suit, and, if he now has possession of the bonds in his cross-complaint mentioned, he must have obtained them surreptitiously and fraudulently.

SMITH AND KERR,
Att'ys for John P. Putnam & others.

And he is ordered to reply to said answer, and to answer said interrogatories on or before the next calling of this cause.

And the same defendants file their joint answer to the cross-complaint of Henry Crawford, with interrogatories to him. Said answer and interrogatories read in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY J. R. R. CO. and others.

Said John Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Her-
151 man Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, for answer to the cross-complaint of Henry Crawford, filed herein, say:

1st. They deny each and every averment therein contained.

2nd. And, for further answer to said cross-complaint, these defendants, and each of them, say that the matters and things contained in the answer of their codefendants Pierson and Seymour, and in the answer of these defendants to the complaint of the plaintiff in this suit, are

true, and they here repeat the averments therein contained, in answer to the cross-complaint of said Crawford as fully and completely as if the same were herein again set forth and repeated.

And, in addition to the facts contained in said answers to the plaintiff's complaint, these defendants further say, that a portion of said bonds mentioned in said cross-complaint, to wit, those numbered 24, 25, 26, 27, 28, and 110, are the same identical bonds owned and used by their codefendant, John S. Davis, in said former suit of foreclosure; that another portion of them, to wit, those numbered 67, 68, 69, 70, and 71, are the identical same bonds owned and used by their codefendant, William B. Lent, in said former suit; and that the remainder of said bonds in said cross-complaint mentioned, to wit, those numbered 43, 54, 55, 56, and 109, are the identical same bonds owned and used by Charles B. Applegate in said former suit, and that judgment was rendered in said former suit upon all of said bonds in said cross-complaint mentioned.

And these defendants further aver that, after judgment had been rendered upon said bonds, as is in their answer to the plaintiff's complaint stated, all of said bonds were placed in the vault of the Ohio Insurance Company for safe-keeping, and to be handed to the clerk of this court to be filed and cancelled, as is alleged in the answer of their codefendant, William B. Lent, to the complaint of the plaintiff; that afterwards, while said bonds were still contained in said vaults, and before they had been delivered to the clerk of the *of this* court to be cancelled, as aforesaid, said Ohio Insurance Company failed, and its effects went into the hands of James M. Haines, who was appointed receiver of the assets of the same by this court, and said bonds were among the papers that so came into the hands of said receiver; that said Henry Crawford was attorney for said receiver, and, as such receiver, had access to said bonds, and by means of such access, or by some means unknown to these respondants, attained said bonds, well knowing that they were not the property of said insurance company, or of said Davis, Lent, or Applegate, but that they had already been put in suit, and that judgment had been obtained upon them as aforesaid.

These respondants further say that, if there has been any negligence whereby said bonds came into the hands of said Crawford, it is not the fault of these respondants and they pray that if any decree be rendered on said bonds, or any of them, it be confined to the property obtained by the original holders and owners of said bonds upon said foreclosure and sale of said mortgaged premises.

JOHN P. PUTNAM AND OTHERS,
By SMITH AND KERR, *their Att'ys.*

And he is ordered to reply to said answer, and to answer said interrogatories, on or before the next calling of this cause.

152 And the said Henry Crawford files his reply to the answer of the last-named defendants, and his answer to their interrogatories; which replication reads in the words and figures, following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
N. A. AND SANDUSKY CITY J. R. R. CO. ET AL.

Henry Crawford replies to the 2nd answer of John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George

R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, to the cross-complaint of said Crawford, and says that there is no such record of proceedings as is therein alleged.

2. And, for further replication to said second answer of said parties to the cross-complaint of said Crawford, he says it is not true, as is alleged in said paragraph, that said Victor A. Pepin produced and filed in this court, in the action of said Pepin against said railroad company, (17,) seventeen , secured by the mortgage herein sought to be foreclosed; but, in truth and in fact, said Pepin did not, nor did any one in his behalf, file or produce as evidence in this court, at any time in said action, said seventeen bonds, or any number of said bonds, nor any copy of said bonds, or any numbers thereof; and all said persons above-named were parties to said action, and bound to take notice of said facts.

Said Crawford further denies that the bonds filed with his cross-complaint, and numbered 24, 25, 26, 27, 28, and 110, are the "identical same bonds" filed by the defendant John S. Davis, in said former suit for foreclosure; but alleges that, in truth and in fact, said John S. Davis never, at any time during the pendency of said action, filed in court, or produced as evidence, said bonds so numbered as aforesaid, or any portion of the same, nor did he, or any one in his behalf, file or produce copies thereof, and that all of the above-named parties were co-defendants with said Davis in said action, and were bound to take notice of the facts herein averred.

Said Crawford further denies that the bonds filed with his cross-complaint, and numbered 67, 68, 69, 70, and 71, are the identical same bonds filed by said William B. Lent in said former suit for foreclosure; but he alleges that, in truth and in fact, said William B. Lent never, at any time during the pendency of said action, nor any one in his behalf, file' in court, or produce in evidence, said certain bonds numbered as aforesaid, or any number of the same, or copies thereof, and all of the above-named parties were codefendants with said Lent, and bound to take notice of the facts herein alleged.

Said Crawford further denies that the bonds filed with his cross-complaint, and numbered 43, 54, 55, 56, and 109, are the identical same bonds filed by Charles B. Applegate in said former suit of foreclosure; but he alleges, in truth and in fact, said Applegate did not at any time, nor did any one in his behalf, file in court, or produce in evidence, said certain bonds so numbered as aforesaid, or any number of the same, or copies thereof, and the above-named parties were codefendants with said Applegate in said action, and were bound to take notice of the facts herein alleged.

And all matters further stated in said answer, the said Crawford denies—each and every allegation therein contained.

R. CRAWFORD AND SON, *P. D.*

153 And the defendant Harvey Seymour files his answer to the cross-complaints of James Montgomery, John S. McDonald, Henry Crawford, Robert M. Weir, and Virgil D. Stockbridge. Said answer reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY J. R. R. Co. and others.

Said William S. Pierson and Harvey Seymour, for answer to the cross-

complaint of James Montgomery, John S. McDonald, Henry Crawford, Robert M. Weir, adm'r, and Virgil D. Stockbridge, say:

That the matters and things stated in their answer to the complaint of the plaintiff, filed heretofore in this suit, are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints of their above-named codefendants as fully and completely as if all said averments were now again repeated.

And having fully answered, they pray to be dismissed with their costs.

SMITH AND KERR,
Attorneys for the Respondants.

And they are ordered to reply to said answer.

And the defendant William J. Parsons files his answer to the cross-complaints last named. Said answer reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY J. R. R. Co.

Said William J. Parsons, for answer to the cross-complaint of James Montgomery, John S. McDonald, Henry Crawford, Robert M. Weir, and Virgil D. Stockbridge, says:

That the matters and things stated in his answer to the complaint of the plaintiff, heretofore filed in this suit, are true, and he now here repeats the averments therein contained, in answer to each of the cross-complaints of his above-named co-defendants, as fully and completely as if all said averments were now here again repeated.

And having fully answered, he prays to be dismissed with his costs, and for all other proper relief.

SMITH AND KERR,
Attorneys for Respondants.

And the last-named defendants are ordered to reply to said answer.

And the plaintiff files his replies, numbered 1, 2, 3, and 4, to the answers of the several defendants herein, and his answer to the several cross-complaints filed herein; which reads in the words and figures following, to wit:

154 In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, Victor A. Pepin, William S. Pierson, and others.

And the said plaintiff, for reply to the several answers of said Pierson and said Seymour, and to the paragraphs of the answers of the several defendants herein adopting and reasserting the same, the same plaintiff says:

1. That said answers, original and amended, and as adopted and re-asserted by said several defendants, are not true; that he denies the matters set forth therein, and requires proof thereof.

J. AND A. B. COLLINS,
For Plaintiff.

2nd. And for second paragraph of reply to said answers as pleaded as aforesaid said plaintiff says there is no such record of proceedings therein averred.

J. AND A. B. COLLINS,
Att'ys "for Pl'ff."

3rd. And for 3rd paragraph for reply to said special answer said plaintiff says that said decree and order of foreclosure and sale therein referred to, and of which exhibit is made, was procured by the parties thereto by fraud and misrepresentations, in this:

That said Victor A. Pepin, in his complaint, avers that he was the holder and owner of seventeen of the bonds in the mortgage specified, and that said Pepin then filed in said court, with the interest-warrants attached, said several bonds, being numbered from 1 to 17, inclusive.

And the said several defendants thereto, including said Pierson and Seymour as such trustees, appeared in said action and plead therein, as did also the other defendants thereto, setting up their several claims on account of bonds held and other demands against said trust, but did not deny or in any way traverse or bring in question the averments in said Pepin's complaint, when, in fact and in truth, the three identical bonds here sued on, with interest-warrants attached thereto, were the property of this plaintiff, and held by him in his possession and under his control at the time of filing said complaint by said Pepin, and at the time said cause was heard, and they had so been for a long time before the filing of said complaint by said Pepin, and so have been ever since.

And the said Pepin never did file or bring into the said court the bonds now sued upon.

Wherefore said plaintiff says that the parties to said suit by said Pepin for foreclosure were guilty of fraud and misrepresentations in procuring and allowing said decree to be entered when they might and should have traversed the averments of said Pepin's complaint, and required him to file in said suit the several bonds mentioned in his complaint.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

4. And as to the special matters set up in the several other
155 paragraphs of said defendants' answers, said plaintiff, for reply thereto, denies each and every material allegation thereof, and requires strict proof.

J. AND A. B. COLLINS,
Attorneys for Plaintiff.

And, for answer to the several cross-complaints filed herein by the several defendants, said plaintiff says he denies each and every material allegation therein.

J. AND A. B. COLLINS,
Attorneys for Pl'ff.

And the defendants Pierson and Seymour move the court to strike out the second paragraph of said reply, which motion is sustained by the court; and said paragraph No. 2 is stricken out, the plaintiff thereto at the time excepting.

And said defendants Pierson and Seymour file their demurrer to the third paragraph of said reply. The motion and demurrer above mentioned read in the following words and figures, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY J. R. R. Co. and others.

Said defendants Pearson and Seymour, John P. Putnam, and others move the court to strike out the 2nd paragraph of the reply of the plaintiff to their several answers filed herein; because said paragraph is surplusage, a general denial being pleaded in the 1st paragraph of said reply.

SMITH AND KERR,
Att'ys for Def'ts.

Said defendants also demur to the third paragraph of the said reply of the plaintiff; because the same does not state facts enough to constitute a defence to the matters stated by the said defendants in their several answers.

SMITH AND KERR,
Attorneys for Def'ts.

And said demur'er is overruled by the court, these said defendants thereto at the time excepting.

And the defendant William B. Lent, by leave of court, files an additional paragraph of his answer to the cross-complaint of Henry Crawford; which reads in the words and figures following to wit:

In the Floyd circuit court, October term, 1864.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCtion Railroad Company and others.

William B. Lent, one of the defendants herein, by way of addi-
156 tional paragraph to his former answer filed herein to the cross-complaint of Henry Crawford, says:

That the matters and things stated in the answer of John P. Putnam and others to the plaintiff's complaint, heretofore filed in this suit, are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints above-named as fully and completely as if all said averments were now again repeated.

JOHN S. DAVIS,
Attorney for Def't.

And the defendants Patterson, Davis, and Applegate file their joint answer to the cross-complaint of said Crawford; which reads in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1864.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Said John S. Davis, Samuel H. Patterson, and Charles B. Applegate, in answer to the cross-complaint of Henry Crawford herein, say:

That the matters and things stated in the answer of John P. Putnam and others to the plaintiff's complaint, heretofore filed in this suit, are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints above-named as fully and completely as if all said averments were now again repeated.

Second. And, for further and second paragraph, said defendants say that the matters and things stated and contained in the answer of their codefendant William B. Lent to the cross-complaint of said Crawford, heretofore filed in this suit, are true, and they now here repeat the averments therein contained in answer to said cross-complaint as fully and completely as if all said averments were now again repeated.

And now, having fully answered, they ask to be discharged with their costs.

DAVIS, *Att'y "for Def'ts."*

And the defendants Davis, Patterson, Lent, and Applegate file their joint answer to the cross-complaint of Weir, adm'r, and of Virgil D. Stockbridge. Said answer reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Said John S. Davis, William B. Lent, Samuel H. Patterson, and Charles B. Applegate, in answer to the cross-complaint of Robert M. Weir, adm'r, and Virgil D. Stockbridge, say:

That the matters and things stated in the answer of John P.
157 Putnam and others to the plaintiff's complaint, heretofore filed in this suit, are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints above-named as fully and completely as if all said averments were now again repeated.

And now, having fully answered, they ask to be discharged with their costs, &c.

JOHN S. DAVIS,
Attorney for Def'ts.

And the defendants Simpkins Love, Caroline Love, Sarah Spurrier, George B. Spurrier Samuel J. Kelly, and John B. Jones file their answers to all the cross-complaints; which reads in the words and figures following, to wit:

In the Floyd circuit court, Oct. term, 1864.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

Caroline Love, Simpkins Love, Samuel J. Kelly, George B. Spurrier, Sarah Spurrier, and John B. Jones, in answer to all the cross-complaints filed herein, setting up bonds and claiming judgment therein, say:

That the matters and things stated in the answer of John P. Putnam and others to the plaintiff's complaint, heretofore filed in this suit, are true, and they now here repeat the averments therein contained in answer to each of the cross-complaints above-named as fully and completely as if all said averments were now again repeated.

And having now fully answered, they ask to be discharged with their costs, &c.

JOHN S. DAVIS,
Attorney for Def'ts.

And the defendant R. M. Weir, adm'r, files his answer to the cross-complaint aforesaid of John P. Putnam and others, and his answer to the cross complaint; which read in the words and figures following to wit:

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company et al.

Robert M. Weir, administrator of the estate of William M. Weir, deceased, answering the cross-complaint of his co-defendants John P. Putnam and others, *and* says that he denies each and every allegation therein contained.

HOWK AND WEIR, *Att'ys.*

And the defendant Henry Crawford files his seperate answer to the cross-complaints of D. H. Cadwalader and Mary M. Fitch, respectively; which reads in the words and figures following, to wit:

158 Floyd circuit court.

WILLIAM LINDLEY.
vs.
N. A. AND S. C. J. R. R. AND OTHERS.

The defendant Henry Crawford answers the cross-complaint of David H. Cadwalader, and specifically denies each and every allegation therein contained.

R. CRAWFORD AND SON, *P. D.*

Floyd circuit court.

WILLIAM LINDLEY
vs.
N. A. AND SANDUSKY RAILROAD AND OTHERS.

The defendant Henry Crawford answers the cross complaint of his

codefendant, Mary M. Fitch, and denies each and every allegation therein contained.

CRAWFORD AND SON, *P. D.*

And his said Crawford's reply to the answer of the defendant Lent to his said Crawford's cross-complaint; which reads in the words and figures following to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE N. A. AND SANDUSKY RAILROAD CO. AND others.

The defendant Henry Crawford replies to the 2nd and 3rd paragraphs of the defendant Lent to the cross-complaint of said Crawford, and specifically denies each and every allegation therein contained.

And for further reply to the answer of Lent to the cross-complaint of said Crawford, said Crawford says that the judgment in the said answer of Lent mentioned was obtained by fraud and misrepresentations in this, that said Lent, said John S. Davis, and Charles B. Applegate appeared in said action, in which Victor A. Pepin was plaintiff and the New Albany and Sandusky Railroad Co. and others were defendants, and severally alleged that they were severally the holders and owners of certain mortgage bonds issued by said railroad company, and that said bonds, together with the interest warrants attached were filed with his answer and made part thereof, when, in truth and in fact, neither said Lent, Applegate, nor Davis had ever filed said bonds in said court, nor ever produced the same as evidence, nor were they then and there the owners of said bonds, or any portion thereof, and said judgment in said Lent's answer mentioned was obtained in the manner aforesaid, and by means of the fraudulent conduct and statements of said Lent, Davis, and Applegate, and not otherwise.

Wherefore said Crawford prays judgment.

R. CRAWFORD, *P. D.*

159 And this cause is continued with leave to the parties hereinbefore required to answer interrogatories, and who have not yet answered the same, to answer on oath on or before the calling of this cause at the next term.

And afterwards, to wit, at the April term of said Floyd circuit court, on the 4th day of May, 1865, come the parties, by their attorneys, and the death of Victor A. Pepin, one of the defendants to this action, is suggested to the court; and thereupon, by consent, it ordered that this cause be continued, with leave to make the heirs of said Pepin parties defendant.

And afterwards, to wit, at the October term of said Floyd circuit court, on the 11th day of November, 1865, come the parties by their attorneys, and the defendants Putnam and others file their demurrer to the reply of Henry Crawford to their answer to his cross-complaint; which reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
NEW ALBANY AND SANDUSKY CITY J. R. R. Co. et al.

Said John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith come and demur severally to each of the paragraphs of the reply of the said Henry Crawford to their answer filed herein, because said paragraphs of said reply do not, nor do either of them, state facts sufficient to constiute a reply in law to the facts stated in said answer.

SMITH AND KERR, *P. D.*

And also their separate demurrers to the third paragraphs of plaintiff's reply to their answer to the complaint, which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION R. R. Co. et al.

Said defendants John P. Putnam, Samuel S. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George R. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith come, and for seperate answer to the third paragraph of the plaintiff's reply to their answer to his complaint filed herein say:

That they demur in law to the said third paragraph to the said plaintiff's reply to their said special answer filed herein, because the same does not state facts sufficient to constitute a reply to the matters stated by these defendants in their said special answer filed herein.

SMITH AND KERR,
Attorneys P. D.

Defendant Lent files his demurrer to the second paragraph of
160 the reply of Crawford to their answer to his cross-complaint; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY J. R. R. Co. et al.

Said William B. Lent comes and demurs to the 2nd paragraph of the reply of said Henry Crawford to the answer of said Lent to the cross-complaint of said Crawford, because the same does not state facts sufficient to constitute a reply in law to the facts stated in said answer.

JOHN S. DAVIS,
Att'y P. D.

And the court, being satisfied in the premises, overrules the demurrers of Putnam and others and Lent, to which decision said Putnam and others and Lent, respectively, excepted at the time; and said Putnam and others file their amended answers to H. Crawford's cross-complaint, and their amended answers to the cross-complaint.

(The papers last mentioned cannot be found in the files.)

And a rule is awarded against said parties to reply to said answers.

Robert M. Weir, administrator, files his demurrer to said amended answers; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, Robert M. Weir, administrator, and C.

Said Robert M. Weir, administrator of the estate of William, deceased, demurs to the 2nd paragraph of the answer of John P. Putnam, Samuel J. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith, as amended to the cross-complaint of said administrator, for the following ground of objection:

That said paragraph, as amended, does not state facts sufficient to constitute a valid defense to said cross-complaint

HOWK AND WEIR,
Att'ys for said Weir.

Which is taken under advisement, and by consent this action is to be continued.

And afterwards, to wit, at the April term of said Floyd circuit court, on the 17th day of May, 1866, come the parties by their attorneys, and the court, being sufficiently advised in the premises, overrules the demurrer of Weir to the amended answers to cross-complaint of Crawford and others, and also overrules the motion to make answers to cross-complaints more specific, to which rulings said Weir at the time
161 excepted. Defendant Crawford files demurrers to all the amended answers to his cross-complaint.

(This paper cannot be found among the files.)

Which demur's are overruled by the court, to which decision, defendant Crawford at the time excepted.

And due proof is made to the court that legal notice had been given to the widow and heirs of Victor A. Pepin, deceased, by publication in the New Albany Weekly Ledger, for three successive weeks, before the first day of this present term of this court. The adult heirs of said Pepin, deceased, appear by H. Crawford, esq'r., their attorney, and are ordered to answer. H. Crawford is appointed guardian ad litem of Ferdinand Pepin, Ella Pepin, and Pauline Pepin, and files the answers of said minors, and also the answer of Lucetta P. Pepin, adult heirs of Victor A. Pepin, dec'd; which read in the words and figures, following to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE SANDUSKY R. R. CO. ET AL.

Lucetta P. Pepin, Amelia M. Stockbridge, and Laura E. Mason answer the complaint herein, and specifically deny each and every allegation therein contained.

HENRY CRAWFORD, *P. D.*

Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY R. R. CO. ET AL.

Ferdinand Pepin, Ella Pepin, and Pauline D. Pepin, by Henry Crawford, their guardian ad litem, answer the complaint, and specifically deny each and every allegation therein contained.

HENRY CRAWFORD,
Guardian ad litem.

And also his reply to the 2nd paragraph of Putnam's answer to his cross-complaint; which reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
SANDUSKY R. R. CO.

Henry Crawford replies to the 2nd paragraph of the answer of John P. Putnam and others to his cross-complaint, and says that he denies each and every allegation therein contained.

And for further reply, to said 2nd paragraph of said answer, he says that he adopts and here reiterates the matters set up in the 3rd paragraph of the plaintiff's reply to the answer of Pearson & others.

HENRY CRAWFORD, *pro se.*

162 Said Putman files his demurrer to the reply (2nd paragraph) of Crawford; which reads in the words and figures following, to wit:

In the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE N. A. AND S. C. J. R. R. CO. AT AL.

Said defendants William J. Pierson, Harvey Seymour, John P. Putnam, Samuel T. Andrews, Sarah C. Day, Elijah De Witt, Rollin C. De Witt, George B. Starr, Horace C. Starr, Herman Ely, Charles Arthur Ely, Augustus H. Moss, and Thomas L. Smith demur to the 2nd paragraph of the reply of Henry Crawford to their answer to his cross-

complaint, because the same does not state facts sufficient to constitute a reply to the matters contained in their cross-complaint.

SMITH, KERR AND GHORMLEY,
For Pierson and Others, Attorneys.

Which is sustained by the court, and Crawford have leave to amend.

And A. E. L. Smith, Morris McDonald, John E. Noyes, John C. Culbertson, James M. Haines, receiver Ohio Insurance Company, Josiah Given, John Sloan, Madison Royer, and Bank of the State of Indiana, for Jeffersonville Branch, are called, but come not.

It is therefore ordered by the court that the complaint be taken as confessed against them.

Thereupon it is ordered that this action be continued generally.

And afterwards, to wit, at the October term of the said Floyd circuit court, on the 10th day of November, 1866, come the parties as heretofore, and said railroad company files her answer to the complaint and cross-complaints; which reads in the words and figures following, to wit:

In Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION R. R. Co. et al.

Said railroad company, for answer to the complaint of the plaintiff and the several crosscomplaints of her co-defendants and to each of them, says:

That the matters and things stated in the answer of her codefendants Pierson and Seymour, and said John P. Putnam, Samuel S. Andrews, and others, to the complaint of the plaintiff in this suit, are true, and that the answers of their codefendants John P. Putman, Samuel S. Andrews, and others to the cross-complaints of Henry Crawford and Virgil D. Stockbridge and other cross-complaints are true; and this defendant here repeats the averments contained in said answers to the complaint of the plaintiff and to the cross-complaints of her said co-defendants, and each of them, as fully and completely as if the same were here repeated in answer to said complaint and said cross-complaint, and each of them.

163 And in addition to the averments therein contained, this defendant says the bonds alleged by said Stockbridge to be in his possession are the same identical bonds sued on by said Pepin in said former suit; that said Pepin never after had them in his possession, but pretended to assign them said Stockbridge, who is his son-in-law, after they had been used in said former suit, as alleged in the answer of their codefendants John P. Putnam and others to the cross-complaint of said Pepin, while they still remained in the custody of said insurance company for safekeeping, and said Stockbridge paid no consideration whatever therefor.

And this defendant further says that the said bonds mentioned by said Henry Crawford in his cross-complaint, filed herein, are the identical used by said William B. Lent, John S. Davis, and Charles B. Applegate in said former suit, and upon which judgment was therein rendered, and said bonds were afterwards obtained by said Crawford from said

insurance company, as stated in the answer of her codefendants John P. Putnam and others to the cross-complaint of said Crawford; when she prays judgment as in the aforesaid answer of Pearson, Seymour, Putnam, and others is prayed.

SMITH, KERR AND GHORMLEY,
Attorneys for said Railroad Company.

2nd. And for further and second answer herein to said complaint of the plaintiff, and each of the cross-complaints for her codefendants filed herein, said railroad company specifically denies each and every averment therein contained.

SMITH, KERR AND GHORMLEY, *P. D.*

Thereupon Henry Crawford, esq., on behalf of the defendants he represents, files his affidavit, and moves the court thereon for an order thereon requiring the attorney of said railroad company to produce his authority for appearing in this action; therefor' defendant, (The Ohio Insurance Company,) Henry Crawford, moves the court to take the affidavit from the files; which motion is overruled, and the attorney for said railroad company makes proof of his authority to appear to the satisfaction of the court, to which said Crawford at the time excepted.

Said railroad company withdraws her special answer, and leaves her general denial on file, and this cause is at issue.

And the judge of this court, being related to John C. Culbertson, one of the parties to this suit, he declines presiding herein, and it is ordered that this cause be tried on the 19th day of February next, before Hon. Charles A. Ray, who is hereby appointed and called to try the same.

(The Hon. Charles A. Ray did not appear to try this cause on the 19th day of February, 1867.)

And afterwards, to wit, at the April term of said Floyd circuit court, on the 18th day of May, 1867, comes the plaintiff, by his attorney, and suggests to the court the death of D. H. Cadwalader, one of the defendants herein, and he files his supplemental complaint making George Phelps and Martha, his wife, parties defendant, who now appear to this action by Howk and Weir, their attorneys, and on plaintiff's motion a rule is awarded against them to answer herein.

And a change of venue having heretofore been granted herein, it is now therefore ordered that this cause be tried at a special term of this court, to be holden at the court-house in New Albany, on the 25th of June, 1867, before some person called by the judge.

(No entry on the record as of the above date.)

164 And afterwards, to wit, at the October term of said Floyd circuit court, on the 6th day of November, 1867, a change of venue from the judge having been heretofore granted herein, the Hon. Patrick H. Jewett, judge of the court of common pleas, is hereby appointed to try the same in its order at the present term.

And afterwards, to wit, at the same term of said Floyd circuit court, on the 23rd day of November, 1867, comes the parties, by their attorneys, and leave is granted said defendant Stockbridge to file a 2nd paragraph of his reply; which reads in the words and figures following, to wit:

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE SANDUSKY CITY JUNCTION R. R.

2nd. Virgil D. Stockbridge replies further to the 2nd paragraph of the answer of John P. Putnam and others to the complaint of this defendant, and says that the foreclosure proceeding which is set up in said 2nd paragraph was incomplete and irregular, and inoperative to pass perfect title under the judgment therein, because, in the said foreclosure action, one William Lindley, who was, at the institution of said foreclosure suit, the owner and holder of three of the bonds secured by the mortgage sought to be foreclosed, and being a necessary party to said proceeding, was not made a party to said action, nor were his bonds included in the said judgment of foreclosure; and further, that the said foreclosure action set up by said Putnam was irregular and inoperative, because the persons in possession of said mortgaged property were not made parties to said suit.

Wherefore this defendant says that he is not barred by said 1st judgment of foreclosure, and prays judgement.

H. CRAWFORD.

To which decision the plaintiff at the time excepted. Thereupon this case is set down for trial on the 16th day of December, 1867, to which time it is ordered that this action be continued.

And afterwards, to wit, at the special term of said Floyd circuit court, on the 19th day of December, 1867, come the parties, by their attorneys, and this action is submitted to the court for trial without a jury. And the trial of said action having progressed for four days, to wit, until the 19th day of December, 1867, it is thereupon ordered that the further consideration thereof be continued until the 30th day of December, 1867.

And afterwards, to wit, at the special term of said Floyd circuit court, on the 27th day of January, 1868, come the parties, by their attorneys, and, after hearing the arguments of counsel, by consent it is ordered that this action be continued until February 14th, 1868.

And afterwards, to wit, at the same term of said Floyd circuit court, on the 18th day of February, 1868, come the parties, by their attorneys, and come also John P. Putnam, Herman Ely, Stevenson Burke, Herman Ely, executor of the last will of C. Arthur Ely, deceased, by Stevenson Burke, their attorney, and John M. Wilson, by Butler and
165 Gresham, his attorneys, and, joining in the plaintiff's complaint herein, file their seperate answers herein, averring therein that they are severally the owners and holders of certain of the bonds described in the mortgage mentioned in said complaint, and severally demand judgment for the amount due on their several bonds, and the relief asked for in said complaint.

Said answers reads in the words and figures following, to wit:

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND S. C. JUNCTION R. R. Co. and others.

John P. Putnam says that he is the owner and holder of 6 of the

bonds issued by said railroad company, numbered 80, 52, 78, 50, 79, 18, which are secured by mortgage in the complaint mentioned.

JOHN PHELPS PUTNAM,
By S. BURKE, *his Att'y.*

Bonds and coupons made exhibits in all respects like bonds and coupons, except as to numbers, exhibited with the complaint of Lindley.

The bonds numbers 52, 78, 50, and 79, and 18, are the same as number 80, with the exception of the number.

Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company and others.

The defendant Herman Ely now comes, and, joining in the complaint, says he is the owner of twelve of the bonds issued by said company, and secured by said mortgage, numbered 37, 35, 34, 81, 84, 87, 85, 53, 38, 83, 33, and 36; and he prays the same relief asked by the plaintiff.

HERMAN ELY,
By S. BURKE, *his Attorney.*

(The bonds Nos. 37, 35, 34, 81, 84, 87, 85, 53, 38, 83, and 36, are the same as number 33, with the exception of No.)

Floyd circuit court.

WILLIAM LINDLEY
vs.
N. A. AND S. C. R. R. CO. AND OTHERS.

Stevenson Burke, joining in the complaint, says that he is the owner and holder of bonds Nos. 91, 92, 93, 94, 95, 96, 97, 51, 15, 16, 17, 14, 73, 74, 75, 76, 39, 32, 31, 82, 86, issued by the said R. R. Co., and secured by the mortgage in the complaint mentioned.

Said bonds were formerly owned by Elijah De Witt, Rollin C. De Witt, Augustus H. Moss, Sarah Coit Day, Samuel J. Andrews, and Catherine D. Andrews, his wife; but said parties do not, nor does
166 either of them, have any interest in the subject-matter of controversy in this action. Said Burke prays the same relief asked for by the plaintiff.

STEVENSON BURKE.

Bonds and coupons made exhibits in all respects like bonds and coupons, except as to numbers, exhibited with complaint of Lindley.

(The bonds numbered 91, 92, 93, 94, 95, 96, 97, 51, 15, 16, 17, 73, 74, 75, 76, 39, 31, 32, 82, 86, are the same as number 14, with the exception of the number.)

Floyd circuit court.

WILLIAM LINDLEY
vs.
N. A. AND S. R. R. CO. AND OTHERS.

The said Herman Ely, as executor of C. Arthur Ely, says that the

said C. Arthur Ely was, at his death, the owner and holder of bonds of the Sandusky R. R. Co., numbered 103, 105, 101, 107, 88, 104, 90, 77, 100, 102, 98, 99, 89, 106, secured by the mortgage mentioned in the complaint herein.

HERMAN ELY,
Executor of C. Arthur Ely, deceased.
By S. BURKE, *his Attorney.*

Bonds and coupons made exhibits in all respects like the bonds and coupons, except as to numbers, exhibited with complaint of Lindley.

(The bonds numbered 103, 105, 101, 107, 88, 104, 90, 100, 102, 98, 99, 89, 106, are the same as bond No. 77, with the exception of the number.)

State of Indiana, Floyd County, in the Floyd circuit court.

WILLIAM LINDLEY
vs.
THE NEW ALBANY, SANDUSKY CITY JUNCTION Railway Company, Thomas L. Smith, George P. Putnam, et al.

John M. Wilson, under plaintiff's complaint filed herein, says he is the owner and holder of one of the one hundred and ten bonds issued by said railway company, described in plaintiff's complaint and secured by the mortgage therein described to wit, bond No. 49, for the sum of one thousand dollars, and the interest-warrants thereto attached; which bonds and interest-warrants are herewith filed, marked "A," and made part hereof, which bond and interest-warrants are due and unpaid.

J. M. WILSON.

And, by consent, the trial of the issues joined in this action is now submitted to the court upon the pleadings and exhibits filed, and the proofs adduced. Upon consideration whereof the court finds that, on the 14th day of November, 1857, in this court, in an action then and there pending, wherein the said Victor A. Pepin was plaintiff, and the said railroad company and others were defendants, a judgment was rendered, and a recovery had upon the mortgage described in the plaintiff's complaint, and each and all of the bonds mentioned and enu-
167 merated in said mortgage; that, under said judgment, all of the premises described in said mortgage had been sold and conveyed, and such sales and conveyances approved and confirmed by this court; that, by the agreement of the parties to said judgment, who were then the holders of said bonds, and the said railroad company, the said mortgaged premises were received by them in full payment, satisfaction, and extinguishment of all claims and demands on said bonds and mortgage, and of the said judgment so rendered thereon, as aforesaid; that, before the rendition of said judgment the bonds mentioned in said Pepin's complaint, and being the same three bonds sued on by the plaintiff in this action, were deposited by said Pepin with the plaintiff herein, to secure the payment of the debt then owing but not then due from said Pepin, upon which said debt there is now due the plaintiff in this action, and wholly unpaid, the sum $6,911 58; that, under said judgment, and the proceedings had in the pursuance thereof, there was conveyed and set off to said Pepin, in his own right, or to his assigns, of the premises described in said mortgage, the real estate in Floyd County, Indiana, described as follows, to wit: The north half of that part of the northwest quarter of section thirty-four, (34,) in township two (2) south,

of range six (6) east, lying west of the Vincennes plank-road, with the exception of $1\frac{33}{100}$ acres deeded to George Lyman, containing eighty (80) acres, more or less; the undivided half of lot No. twenty-eight, (28,) on Upper Fourth street, in the City of New Albany; lot No. thirteen, (13,) on Jackson street, in Moore's plat in said city; lot No. four, (4,) on Scott street, in same plat; lots Nos. 23 and 24 on Poplar street, in plat No. 20 of said city; lots Nos. 33 and 35 on Elm street, in said plat No. 20; lot No. 27, on Shipping street, in said plat No. 20; and lots Nos. 2 and 3 on Beach street, in block "C" of said plat No. 20, with the appurtenances; that of real estate the undivided three-seventeenths parts thereof was had and received by the said Pepin and his assigns in trust to secure the payment of said sum of money so due as aforesaid to the plaintiff in this action, and that the purchasers of said real estate now in possession thereof acquired the same with full notice of the plaintiff's equities and rights therein.

And as to each and all the other parties to this action claiming to be the owners and holders of any of the bonds described in said mortgage and seeking judgment thereon, the court further finds in favor of the defendants to their respective claims or complaints herein, and that the said claimants, and each of them, have no equities whatever in their said claims, and are not entitled to any relief in this action.

And whereupon the plaintiff, with leave of the court, amends his complaint in comformity with the finding of this court, and files his amendment accordingly, which reads in the words and figures following, to wit:

"Amendment filed on the hearing to conform to the proof: And said plaintiff charges that the said Victor A. Pepin heretofore filed his proceedings in this hon. court to compel an execution of the trust in said Pierson and Seymour, in which proceeding he, said Pepin, undertook, without authority from this plaintiff, or his knowledge, to represent himself as the owner of said three bonds now here sued on, and actually proceeded to final decree, and to realize the amount distributable to them of the proceeds of the sale under such foreclosure decree."

It is therefore considered and adjudged by the court that the said undivided three-seventeenths (3-17) part of said real estate in Floyd County known and described as follows:

The north half of that part of the northwest quarter of section
168 thirty-four, (34,) in township two (2) south, of range six (6) east, lying west of the Vincennes plank-road, with the exception of $1\frac{33}{100}$ acres, deed to George Lyman, containing eighty (80) acres, more or less;

The undivided half of lot No. twenty-eight (28) on Upper Fourth street, in the city of New Albany;

Lot No. thirteen (13) on Jackson street, in Moore's plat in said city;

Lots Nos. 23 and 24 on Poplar street, in plat No. 20 of said city;

Lots Nos. 34 and 35 on Elm street, in said plat No. 20;

Lot No. 27 on Shipping street, in said plat No. 20, and lots Nos. 2 and 3 on Beach street in block "C" of said plat No. 20, with the appurtenances, be sold as other lands are sold on execution, without any relief whatever from valuation or appraisements laws, and that the proceeds of such sale shall be applied, first, to the payment of the costs of said action; secondly, to the payment of said William Lindley of the sum of $6,911 58, with interest thereon from this date; and, thirdly, that the surplus, if any, shall be paid over to the present owners of said real estate, their heirs or assigns.

And it is further considered and adjudged by the court that the said

John P. Putman, Herman Ely, Stevenson Burke, Herman Ely, executor of the last will of C. Arthur Ely, deceased, John M. Wilson, Henry Crawford, Virgil D. Stockbridge, and each other defendants who have filed cross-complaint herein, do take nothing by their suits herein, and as to each of their claims or complaints herein, that the defendants thereto go hence thereof without delay, &c.

STATE OF INDIANA, *Floyd County, sct:*

I, William W. Tuley, clerk of the Floyd circuit court, hereby certify that the above and foregoing is a full, true, and complete transcript of all proper entries made by the clerk, and all papers pertaining to this cause and filed herein, as the same remain of record and on file in this office.

{ SEAL'S } Witness my hand and the seal of said court affixed at New
{ PLACE. } Albany this 26th day of August, A. D. 1868.

W. W. TULEY,
Clerk Floyd Circuit Court.

Pleas before the honorable the Floyd circuit court, in the 2d judicial circuit of the State of Indiana, continued and held by adjournment at the court-house, in the city of New Albany, on the 10th day of November, 1857—Hon. George A. Bicknell, judge.

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY, MICHAEL STREEPEY, the New Albany and Sandusky City Junction Railroad Company, and James Montgomery.

Be it remembered that, heretofore, to wit, on the 10th day of June, 1856, the plaintiff, by Crawford, Moody, and others, filed his complaint herein in the words and figures following, to wit:

STATE OF INDIANA, *Floyd County, ss:*

In the Floyd circuit court.

John Briggs complains of The City of New Albany, Michael Steepey, the New Albany and Sandusky City Junction Railroad
169 Company, and James Montgomery, and says that, on the 18th of November, 1853, the common council of the city of New Albany passed an ordinance, which, among other things, recited that three-fourths of the legal voters of the city had petitioned the common council to subscribe for stock to an amount not exceeding $600,000 in said railroad company, and ordained that Joseph A. Moffett, mayor of the city, be authorized and directed to subscribe for the city $400,000 to the capital stock of the railroad company first aforesaid; and said Moffett, as such mayor, on the 19th of November, 1853, subscribed that amount for the city to said stock; and on the 7th of March, 1855, the common council passed a further ordinance to ratify and confirm said subscription; on the day of June, 1855, the common council ordered that a tax of forty-five cents on the $100 be levied on all the taxable property in the city on account of the city subscription to said stock. Said Streepey was the treasurer of the city, and the common council caused a tax duplicate for the year 1855 to be delivered to him with a warrant under

the seal of, signed by the mayor of, and attested by the clerk of, the city, directing said Streepy to collect the tax named in the duplicate, including said tax on account of railroad subscription. The plaintiff was then, and now is, a resident of said city, and owned taxable property therein, and there was assessed against him in said duplicate, on account of the city's subscription to said stock, a tax of sixty-one dollars and ninety cents; and said Streepy, on the 31st of Dec., 1855, under color of the authority of said warrant, sold at public auction, and in fee, to said Montgomery, those lands in the city which were the property of the plaintiff, and are known as the north 23 feet of lot No. 28 on State street, and lot No. 25 on Scott street, Morris plat 16, for the sum of $62 50, to satisfy railroad tax and costs of sale.

The railroad proposed to be built by said railroad company, and for the building of which said subscription was made, extends from the city of New Albany to the line of the State of Ohio, in the direction of Sandusky, in Ohio. There was no law in force which authorized or empowered or required three-fourths or any other portion of the legal voters of the city of New Albany to petition the common council to subscribe for said stock, or which gave any validity or effect to said subscription in consequence of such petition. Three-fourths of the legal voters did not so petition the common council. The ordinance of the common council to authorize the mayor to make said subscription, the subscription by the mayor, the ordinance of the common council to ratify and confirm it, the tax assessed against the plaintiff on account of it, and the sale of the plaintiff's property, under color of it, as aforesaid, are all illegal and void, and said railroad company was not rightfully organized, and was not a legal corporate body at any time before May 20th, 1856, although pretending to be such, and the plaintiff, ever since said tax was assessed, has had in said city sufficient personal property to satisfy said tax and all costs of collecting it.

Therefore the plaintiff prays that said subscription for stock, the tax so assessed against him, and the sale of his property, as aforesaid, be declared void, and that he have such other relief as shall be right.

CRAWFORD AND MOODY, &c.,
Pl'ff's Att'ys.

And afterwards, to wit, at the October term of said court, on the 14th day of November, 1856, among other were the following proceedings, to wit:

170 JOHN BRIGGS
v.
THE CITY OF NEW ALBANY, &c.

Come the parties, and The City of New Albany files her demurrer to so much of the complaint herein as avers that the said plaintiff, at and after the time of the assessment of the tax in said complaint mentioned, was the owner of personal property in said city, subject to taxation.

Said demurrer was as follows, to wit:

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY, MICHAEL Streepey, The New Albany and Sandusky City Junction Railroad Company, and James Montgomery.

The City of New Albany by her attorney, demurs to the allegations

of the complaint herein, which reads as follows, to wit: "And the plaintiff, ever since said tax was assessed, has had in said city sufficient personal property to satisfy said tax, and all costs of collecting it," for the following ground of objection:

1st. That said allegation does not state facts sufficient to constitute a cause of action.

JOHN H. STOTSENBURY, *Att'y.*

And the said Montgomery files a like demurrer, and, after argument' said demurrers are sustained by the court, and said defendants are ordered to answer the residue of said complaint, and the said railroad company, Montgomery, and The City of New Albany, file seperate answers accordingly.

The answer of the said railroad company reads as follows, to wit:

JOHN BRIGGS
v.
CITY OF NEW ALBANY ET AL.

Said railroad company, a defendant, answering in her defense, says, for answer to plaintiff's complaint, that she admits that said common council passed an ordinance on the 18th November, 1853, reciting and authorizing as stated in plaintiff's complaint; that, on 19th November, said sum was subscribed; that, on the 7th of March, 1855, an ordinance ratifying and confirming said subscription, as plaintiff has alleged; but she denies each and every allegation in said complaint, except as herein above admitted, except that proposed railroad extended from a point in the city of New Albany to the line of the State of Ohio, in the direction of Sandusky, in Ohio.

SMITH AND DAVIS, *P. D.*

The answer of defendant Montgomery reads as follows:

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY ET AL.

James Montgomery, a defendant, seperately answering, says:

1. That he has never perfected any title to the property alleged to have been purchased by him, and prays to be hence dismissed.

171 2. He admits the facts stated in the petition, except so much thereof as denies the lawful existence of said company, and that ¾ of the citizens did not subscribe and petition for the subscription by the city council, and the asserted illegality and nullity of the laws and ordinances in said complaint alleged. He denies that he is a rightful party to this suit, and prays to be dismissed with costs and general relief.

S. AND DAVIS.

The seperate answer of the defendant The City of New Albany reads in the words and figures following, to wit:

Floyd circuit court, Oct. T., 1856.

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY ET AL.

The City of New Albany, answering, says that she admits that said

common council passed an ordinance on the 18th November, 1853; that said subscription was made on the 19th November, 1853; that an ordinance was passed on the 7th of March, 1855; that a tax was levied; and she denies the other matters alleged in the complaint, and requires strict proof thereof.

2d. And for 2d defence, said city alleges, admitting the passage of the ordinances stated and the subscription of the stock, the levy of the tax, and that the plaintiff is a resident owner of taxable property in said city, and denying the other allegations in said complaint, except so much as alleges that ⅗th did not subscribe; as to that defe*f*endant says that said ordinance was passed reciting that ⅗ths of the legal voters of New Albany petitioned said common council to subscribe for said stock, not exceeding $600,000, and, relying upon said company, permitted said city to subscribe for shares of the corporate capital stock of said company, and took the bonds of said city in payment thereof, and issued to said city the requisite certificates for said capital stock so subscribed; and said defendant pleads and submits to the court that said acts and doings were in good faith, and that said city and each taxpayer thereof is estopped from setting up that ⅗ths of the legal voters did not sign petitions to said council, praying for said subscription.

JNO. H. STOTSENBURY, *Att'y.*

The plaintiff thereupon files her demurrer to the second defence of The City of New Albany as follows, to wit:

JOHN BRIGGS
v.
CITY OF NEW ALBANY, &C.

And said plaintiff demurs to the second answer of said city, and for cause sets down—

1. That the matters therein contained are no estoppel to said plaintiff.
2. And that said defendant cannot set up its own act as an estoppel against this plaintiff.
3. And for that said answer contains no sufficient defence against the action herein.

CRAWFORD, &C., *f'r Pl'ff.*

172 Which demurrer, after argument, is sustained by the court, and the city files an amended 2d defence, (which amendment is by interlineation, and is set out in full above,) and the plaintiff answers thereto as follows, to wit:

And the said plaintiff demurs to the amended second defence of the said City of New Albany, and for cause sets down:

1. The matters of estoppel therein pleaded are no bar to the plaintiff's action.
2. That said city cannot set up its own act as an estopp*le* against this plaintiff.

CRAWFORD, &C., *P'y.*

And the demurrer is sustained, and the city again amends her 2d defence, (said amendment is not found in the files,) and the plaintiff files his reply thereto, (said reply is not found in the files of the case in the clerk's office,) and also his seperate replys to the answers of the said Montgomery and the said railroad company.

And afterwards, to wit, at the same term of said court, in the 15th day of November, 1856, come the parties by their counsel, and, by consent, it is ordered that the testimony be taken by D. C. Anthony and George V. Howk, as commissioners in the case of Peter Tellon v. The City of New Albany, &c., and the report of said commissioners shall be regarded as testimony taken in this case, and this cause is continued until next term.

And afterwards, to wit, at the April term of said court, on the 18th day of May, 1867, come the parties by their attorneys, and it is ordered by the court that the commissioners heretofore appointed to take proof in this action have further time to make report herein, the taking of the evidence to be closed within twenty days before the next term of this ceurt, at which time the commissioners are ordered to make report of the evidence then taken, and this action is ordered to be continued.

And afterwards, to wit, at the October term of said court, on the 10th day of November, 1857, among other were the following proceedings, to wit:

JOHN BRIGGS
v.
THE CITY OF NEW ALBANY, THE NEW ALBANY and Sandusky City Junction Railroad Company, James Montgomery, and Michael Streepey.

Come now George V. Howk and D. C. Anthony, esq'rs, commissioners heretofore appointed to take the proofs upon an issue herein joined, as to whether three-fourths of the loyal voters of said city in 1853 had petitioned the common council thereof to subscribe for said stock, and to make report therein, and make report they have since the October term, 1856, of this court, proceeded to take the proof which is now here submitted, and that they find that three-fourths of the legal voters of said city did not petition for the subscription of four hundred thousand dollars of the stock of said railroad company; which report is now here by the court approved, and ordered to be filed amongst the papers of this cause.

And thereupon come the said parties by their attorneys, and agree
173 the court now here shall order and decree that said city and its office's and the said railroad company shall be perpetually restrained and enjoined from taking any steps to enforce or collect any tax or taxes assessed against said Briggs for said railroad purposes, and vacating and annulling all sales of his property heretofore made therefore.

Whereupon, on motion of said Briggs, and pursuant to said finding and arguments, it is ordered that the said City of New Albany and its officers and said railroad company be, and they are hereby, restrained and perpetually enjoined from taking any further steps to enforce or collect any tax or taxes assessed against said Briggs for said railroad purposes.

It is also ordered and decreed, in pursuance to said finding and agreement, that all sales heretofore made by order of said city, or under or by any of its officers, of any of the property of said Briggs on account of taxes assessed for said railroad purposes to any of said defendants, be, and the same are hereby, set aside and held for naught as if they had never been made.

It is also ordered that said Howk and Anthony be allowed the sum of five hundred dollars each, to be taxed as part of the costs herein.

And it is also ordered, by the agreement of the parties as aforesaid, that said City of New Albany pay the costs of this suit, and that said plaintiff have execution therefor; all of which is finally ordered, adjudged, and decreed.

STATE OF INDIANA,
Floyd County, sct:

I, William W. Tuly, clerk of the Floyd circuit court, hereby certify the foregoing to be a full, true, and complete transcript of all proper entries made by the clerk, and all papers pertaining to this cause on file therein, as the same appear of record and on file in our office.

Witness my hand and the seal of said court this 30th day of April, 1869.

[SEAL.] W. W. TULEY, *Clerk.*

Pleas before the honorable the Floyd circuit court in the 2 judicial circuit of the State of Indiana, continued and held by adjournment at the court-house in New Albany, on the 10th day of November, 1857—Honorable George A. Bicknell, judge.

PETER TELLON
v.
THE CITY OF NEW ALBANY, MICHAEL STREEPEY, The New Albany and Sandusky City Junction Railroad Company, and James Montgomery.

Be it remembered that, heretofore, to wit, on the 10th day of June, 1856, the plaintiff, by Crawford, Moody, &c., his attorneys, filed his complaint herein as follows, to wit:

STATE OF INDIANA, *Floyd County, ss:*

In the Floyd circuit court.

Peter Tellon complains of The City of New Albany, Michael Steepey, The New Albany and Sandusky City Junction Railroad
174 Company, and James Montgomery, and says that, on the 18th of November, 1853, the common council of the city of New Albany passed an ordinance, which (among other things) recited that three-fourths of the legal voters of the city had petitioned the common council to subscribe for stock to an amount not exceeding $600,000 in said railroad company or in the Fort Wayne and Southern Railroad Company, and ordained that Joseph A. Moffit, mayor of said city, be authorized and directed to subscribe for the city $400,000 to the capital stock of the railroad company first aforesaid; and said Moffett, as such mayor, on the 19th day of November, 1853, subscribed that amount for the city to said stock; and on the 7th of March, 1855, the common council passed a further ordinance to satisfy and confirm said subscription; on the day of June, 1855, the common council ordered that a tax of forty-five cents on the $100 be levied on all the taxable property of the city, on account of the city subscription to said stock. Said Steepey was the treasurer of the city, and the common council caused a tax duplicate for the year 1855, to be delivered to him, with a warrant under his seal,

signed by the mayor and attested by the clerk of the city, directing said Streepey to collect the taxes named in the duplicate, including said tax on account of said railroad subscription. The plaintiff was then, and now is, a resident of said city, and owned taxable property therein, and there was assessed against him in said duplicate, on account of the city's subscription to said stock, *or* tax of forty dollars and seventy three cents; and said Streepey, on the 31st of December, 1855, under color of authority of said warrant, sold at public auction in fee to said Montgomery those lands in the city which were the property of the plaintiff, and are known as the east forty-seven feet of lot No. 37, on Lower High street; lot No. 3 and the undivided half of lot No. 2, on Lower Market street, Gore; lots Nos. 19 & 20, on Lower Water street; lot No. 10, on Lower 4th street; and north half of lot No. 6, on Lower Fifth street; letter "A" and south half of lot 36, plat 19, for the sum of $41 43, to satisfy said railroad tax and the costs of sale.

The railroad proposed to be built by said railroad company, and for building which said subscription was made, extends from the city of New Albany to the line of the State of Ohio, in the direction of Sandusky, in Ohio. There was no law in force which authorized or required three-fourths or any other proportion of the legal voters of the city of New Albany to petition the common council to subscribe for said stock, or which gave any validity or effect to said subscription in consequence of said petition. Three-fourths of the legal voters of the city did not so petition the common council; the ordinance of the common council to authorize the mayor to make said subscription, the subscription by the mayor, the ordinance of the common council to ratify and confirm it, the tax assessed against the plaintiff on account of it, and the sale of the plaintiff's property under color of it as aforesaid, are all illegal and void; and said railroad company was not rightfully organized, and was not a legal corporation at any time before May 20th, 1856, although pretending to be such; and the plaintiff, ever since said tax was assessed, has had in said city sufficient personal property to satisfy said tax and all costs of collecting it.

Therefore the plaintiff prays that said subscription for stock, the tax so asseessed against him, the sale of his property as aforesaid, be declared void, and that he have such other relief as shall be right.

CRAWFORD, MOODY, &c.,
Pl'iff Att'ys.

175 And afterwards, to wit, at the October term of said court, on the 14th day of November, 1856, among other were the following proceedings, to wit:

PETER TELLON
v.
THE CITY OF NEW ALBANY ET AL.

Come the parties, and The City of New Albany files her demurrer to so much of the complaint herein as avers that the said plaintiff, at and after the time of the assessment of the tax in said complaint mentioned, was the owner of personal property in said city subject to taxation; and the said Montgomery files a like demurrer; and, after argument, said demurrers are sustained by the court, and said defendants are ordered to answer the residue of said complaint; and said railroad company, City of New Albany, and Montgomery files seperate answers accordingly.

(Said answers are not now on the files.)

The plaintiff thereupon files his demurrer to the 2d defence of the city of New Albany as follows, to wit:

PETER TELLON
vs.
THE CITY OF NEW ALBANY, &c.

And said plaintiff demurs to the second answer of said city, and for cause sets down:

1. That the matters therein contained are no estopp*le* to said plaintiff.
2. And that said defendant cannot set up its own act as an estopp*le* against this plaintiff.
3. And for that said answer contains no sufficient defense against the action herein.

COLLINS, &c., *For Pl'ff.*

Which demurrer, after argument, is sustained by the court, and the city files an amended second defense, (not on file,) and the plaintiff demurs thereto as follows:

PETER TELLON
v.
CITY OF NEW ALBANY, &c.

And said plaintiff demurs to the amended second defense of the said City of New Albany, and for cause sets down:

1. The matters of estopp*le* therein pleaded, *and* no bar to the plaintiff's action.
2. That said city cannot set up its own acts as an estopp*le* against this plaintiff.

COLLINS AND LAFALLETTE,
For Pl'ff.

And the city amends the second defense, (not on file at this time,) and the plaintiff files his reply thereto, (not on file at this time,) and also his seperate replies to the answer of the said Montgomery and the said railroad company, (not on file at this time;) and, by consent of
176 parties, the issues herein are submitted to the court for trial without a jury, and the consideration thereof is deferred until to-morrow morning.

And afterwards, to wit, at the same term of said court, on the 15th day of November, 1856, among other were the following proceedings, to wit:

PETER TELLON
v.
THE CITY OF NEW ALBANY ET AL.

Come now the parties by their counsel, and by consent, it is ordered by the court that D. C. Anthony and George V. Howk be, and they are hereby, appointed commissioners in this cause, to take and report to the court, at the next term, testimony upon the issue joined herein, whether or not three-fourths of the legal voters of New Albany, in the year 1853, signed that petition to the common council, praying for a subscription to railroad stock, as in the pleadings is alleged; and that said commis-

sioners report to the court, not only the testimony by them taken by virtue hereof, but also the fact as found by them upon the testimony; and this cause is continued until next term.

And afterwards, to wit, at the April term of said court, on the 18th day of May, 1857, among other were the followings proceedings, to wit:

PETER TELLON
v.
THE CITY OF NEW ALBANY ET AL.

Come the parties by their attorneys, and it is ordered by the court that the commissioners heretofore appointed to take proof in this action have further time to make report herein, the taking of the evidence to be closed within twenty days before the next term of this court, at which time the commissioners are ordered to make report of the evidence then taken; and this action is ordered to be continued.

And afterwards, to wit, at the October term of said court, on the 10th day of November, 1857, among other were the following proceedings, to wit:

PETER TELLON
v.
THE CITY OF NEW ALBANY, THE NEW ALBANY and Sandusky City Junction Railroad Co., James Montgomery, and Michael Streepey.

Come now George V. Howk and D. C. Anthony, esq'r's, commissioners heretofore appointed to take the proofs upon an issue herein joined, as to whether three-fourths of the legal voters of said city in 1853 had petitioned the common council thereof to subscribe for said stock, and to report thereon, and make a report. They have since the October term, 1856, of this court, proceeded to take the proof, which is now here submitted; and that they find that three-fourths of the legal voters of said city did not petition for the subscription of four hundred thousand dollars of the stock of said railroad company; which report is
177 here now by the court approved, and ordered to be filed amongst the papers of this cause; and thereupon come the said parties by their respective attorneys, and agree that the court now here shall order and decree that said city and its officers, and the said railroad company, shall be perpetually restrained and enjoined from taking any further steps to enforce or collect any tax or taxes assessed against said Tellon for said railroad purposes, and vacating and annulling all sales of his property heretofore made therefore.

Whereupon, on motion of said Tellon, and pursuant to said finding and agreement, it is ordered and decreed that said City of New Albany, and its officers, and said railroad company be, and they are hereby, perpetually restrained and enjoined from taking any further steps to enforce or collect any tax or taxes assessed against said Tellon for said railroad purposes.

It is ordered and decreed, in pursuance of said finding and agreement, that all sales heretofore made by order of said city, or under or by any of its officers, of any of the property of said Tellon, on account of taxes assessed for said railroad purposes to any of said defendants, be, and the

same are hereby, set aside and held for nought, as if they had never been made.

It is ordered that said Howk and Anthony be allowed the sum of five hundred dollars each, to be taxed as a part of the costs herein.

And it is also ordered, by the agreement of parties as aforesaid, that said city of New Albany pay the costs of this suit, and that said plaintiff have his execution therefore; all of which is finally ordered, adjudged, and decreed.

STATE OF INDIANA, *Floyd County, set:*

I, William Tuley, clerk of the Floyd circuit court, hereby certify the foregoing to be a full, true, and complete transcript of all proper entries made by the clerk, and all papers pertaining to this cause on file therein, as the same appear of record and on file in our office.

Witness my hand and the seal of said court affixed at New Albany this 1st day of May, A. D. 1869.

[SEAL.] W. W. TULEY, *Clerk.*

Please before the honorable the judge of the Floyd circuit court, within the second judicial circuit of the State of Indiana, continued and held by adjournment at the court-house, in the city of New Albany, on the thirteenth day of May, A. D. 1858—present, the Honorable James Callins, sole judge, pro tem.

VICTOR A. PEPIN
v.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, Thomas L. Smith, John S. Davis, James Montgomery, William M. Wier, William B. Lent, Charles B. Applegate, and John S. McDonnald.

Be it remembered that, heretofore, to wit, on the 21st day of January, 1858, the plaintiff, by his attorneys, filed in the office of the clerk of the Floyd circuit court his complaint herein; which reads in the words and figures following, to wit:

178 THE STATE OF INDIANA, *Floyd County, ss:*

In the Floyd circuit court, April term, 1858, Victor A. Pepin, plaintiff, complains of the New Albany and Sandusky City Junction Railroad Company, John S. Davis, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Thomas L. Smith, and William M. Weir, defendants, and says that the said New Albany and Sandusky City Junction Railroad Company executed a mortgage, conveying to said plaintiff and the said defendants Davis, Applegate, Montgomery, McDonald, Lent, Smith, and Weir, the lands and lots in said mortgage described, as security to each of them and said plaintiff, in the sum of two thousand two hundred and sixty dollars, which said parties and said plaintiff had become respectively liable for, for said railroad company, making, in all, the sum of eighteen thousand one hundred and eight dollars, which mortgage is herewith filed and made part of this complaint.

And the plaintiff would further show that he has been compelled to pay said sum of two thousand two hundred and sixty dollars that he was liable for as aforesaid for said railroad company, which sum was to be paid without any benefit from valuation or appraisement laws of

the State of Indiana. And said plaintiff would further show that all of said other parties have paid their several amounts secured to them by said mortgage, and that said several sums were to be paid to them respectively, without benefit from the valuation or appraisement laws of the State of Indiana.

Wherefore, in view of the premises, said plaintiff sues and demands judgment against said railroad company for twenty-five hundred dollars, the foreclosure of said mortgage, the sale of said mortgaged property, or so much thereof as may be necessary to pay said debt, and for all other proper relief.

VICTOR A. PEPIN,
By OTTO AND DAVIS,
His Attorneys.

Said mortgage filed with and referred to in the foregoing complaint, reads as follows:

This indenture, made the 20th day of October, in the year 1857, between The New Albany and Sandusky City Junction Railroad Company, of the one part, and Victor A. Pepin, John S. Davis, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Thomas L. Smith, and William M. Weir, of Floyd County, Indiana, of the other part, witnesseth: That, for and in consideration of eighteen thousand dollars in hand paid, said railroad company hereby conveys and warrants to the said Pepin, Davis, Applegate, Montgomery, McDonald, Lent, Smith, and Weir, forever, the north one hundred and fifty-eight feet, more or less, commencing two hundred feet from the front corner of Benjamin Conner's house, in out-lot letter "C," fronting on Upper Sixth street, and running back one hundred and thirty feet the same width, and adjoining the lot purchased by said company of John Farnell, said lot being known as a part of the Ferry lot, and being the same property purchased by said company of Thomas Connor and wife, by deed bearing date June the 5th, 1856, with the appurtenances, and all that part of out-lot No. fifty, in the town of Clarksville, Clark County, Indiana, which lies south of the center of the Clark County Central plank-road, and west of a line drawn and produced from the east side of lot number sixty-six, in said town, to the center of said plank-road, containing
179 ten acres more or less; also, out-lot No. two, in the first range of out-lots, in the city of New Albany aforesaid; and lot number fourteen, in Winstandly and Newkirk's addition to said city of New Albany; and also lots numbers twelve, fourteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, and twenty-six, on Lower Seventh street, of John Evans' plat of lots letters "D," "E," and "F," on Lower Water street, in said city of New Albany; also, lots numbers fifteen, seventeen, twenty-three, twenty-five, twenty-seven, twenty-nine, on Evans' street plat, and the southern ten feet in front and rear by one hundred and twenty feet deep of lot number nineteen, in said Evans' plat, and lot number forty-nine on Upper Vincennes street, in said city, with the appurtenances.

The foregoing conveyance is made for the purposes following, to wit:

Whereas said Pepin, Davis, Applegate, Montgomery, McDonald, Lent, Smith, and Weir have each became liable for the sum of two thousand two hundred and sixty-six dollars for said railroad company, making in all the sum of eighteen thousand one hundred and eight dollars:

Now, therefore, if said company shall an' will save each of said parties harmless, and from the payment of anything on account of said

liabilities, then the foregoing mortgage to be void; otherwise to be and remain in full force and virtue in law; and the same shall be collectable without any benefit from the valuation or appraisement laws of the State of Indiana.

In witness whereof I, James Montgomery, the president of said New Albany and Sandusky City Junction Railroad Company, by the authority and direction of said company, have hereto subscribed my name as such, and affixed the seal of said railroad company, this 20th day of October, 1857.

[L. S.] JAMES MONTGOMERY,
President of the New Albany and Sandusky City Junction R. R. Co.

Attest:
JOHN W. CHILDS, *Sec'ty of said Co.*

STATE OF INDIANA, *Floyd County, ss:*

Personally appeared before me, William A. Scribner, a notary public within and for the county aforesaid, the above-named James Montgomery, and acknowledged the foregoing written instrument to be the act and deed of the New Albany and Sandusky City Junction Railroad Company, for the uses and purposes therein expressed, and that he, as president of said company, in his official capacity, has executed the foregoing indenture by the order and direction of said company.

In witness whereof I hereto set my name and impressed my [L. S.] notarial seal, at the city of New Albany, this 27th day of October, A. D. 1857.

Upon the filing of which complaint and exhibit the following writ issued:

The State of Indiana to the sheriff of Floyd County, greeting:

We command you to summon the New Albany and Sandusky City Junction Railroad Company, John S. Davis, Charles B. Applegate, James Montgomery, John S. McDonald, William B. Lent, Thomas L. Smith, and William M. Weir, if they be found in your bailiwick,
180 personally to appear before the honorable Floyd circuit court, on the second day of the next term thereof, to be holden at the court-house in the city of New Albany, on the fourth Monday of April, 1858, then and there to answer to the complaint of Victor A. Pepin; and of this writ make due service and return.

Witness Salem P. Town, clerk of said court, and the seal thereof hereto affixed, at the court-house in New Albany, this 21st day of January, 1858.

[L. S.] SALEM P. TOWN, *Clerk.*

Upon which the sheriff made the following return:

I have served this writ upon all of the within-named defendants by reading the same in their presence and hearing, and also on James Montgomery, president of the within-named railroad company, by reading the same to him in his presence and hearing.

Feb. 11, 1858.

CHARLES FREDRICKS, *S. F. C.*

And afterwards, to wit, at the April term of said court, continued and held as aforesaid, and on the 30th day of April, 1858, come the parties, by their attorneys, and, on motion of the plaintiff, a rule is awarded against the defendant to answer herein on to-morrow morning.

And afterwards, to wit, on the 13th day of May, 1858, and at the same time of said court, comes the plaintiff, by his attorneys, and the defendants also come, by their attorneys, and the said railroad company, for seperate answer herein, says and admits that all the matters and things stated in said plaintiff's complaint are true; that the amount due to said plaintiff, and to each of said other defendants, is eighteen hundred dollars, which is payable without any relief from valuation and appraisement laws. And the said other defendants, Thomas L. Smith, John S. Davis, James Montgomery, William M. Weir, William B. Lent, Charles B. Applegate, and John S. McDonald, each for his seperate answer, herein says that he admits the execution of said mortgage for the purpose of securing the payments of the several amounts therein set forth, and avers that he has been compelled to pay, and has paid, the whole amount mentioned and secured to him in said mortgage, being the sum of twenty-two hundred and sixty-six dollars, of which sum there yet remains due to him and unpaid the sum of eighteen hundred dollars, which is payable without any relief from the valuation and appraisement laws. And this matter being submitted to the court for final trial upon the plaintiff's complaint, and said several answers and proofs to be adduced, and the court, being fully advised in the premises, finds that there is due from said New Albany and Sandusky City Junction Railroad Company, to each of said other defendants, and to said plaintiff, by reason of the matters in said plaintiff's complaint contained, the said sum of eighteen hundred dollars, to be executed as aforesaid, and that said mortgage ought to be foreclosed.

It is now, therefore, considered and decreed by the court that the said Victor A. Pepin, Thomas L. Smith, John S. Davis, Cha's B. Applegate, James Montgomery, William B. Lent, William M. Weir, and John L. McDonald, do each, in severalty and in his own separate right, recover of said railroad company the said sum of eighteen hundred dollars, together with all costs by him herein expended, to be executed as aforesaid; and that said mortgage be foreclosed, and said mortgaged premises, or so much thereof as may be necessary to pay said several
181 sums and all costs herein, be sold as other lands are sold on execution, and that said mortgaged premises are correctly described as follows, to wit: The north one hundred and fifty-eight feet, more or less, commencing two hundred feet from the front corner of Benjamin Conner's house, in out-lot "C," fronting on Upper Sixth street, and running back one hundred and thirty feet the same width, and adjoining the lot purchased by said company of John Farrell, said lot being known as a part of the Ferry lot, and being the same property purchased by said company of Thomas Conner and wife, by deed bearing date of June 5th, 1856, with all the appurtenances; and all that part of out-lot No. fifty, in the town of Clarksville, Clark County, Indiana, which lies south of the center of the Clark County central plank-road, and west of a line drawn and produced from the east side of lot No. sixty-six, in said town, to the center of said plank-road, containing ten acres, more or less; also, out-lot number two, in the first range of out-lots in the city of New Albany aforesaid, and lot number fourteen, in Winstandly and Newkirk's addition to said city of New Albany; and also, lots number twelve fourteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, and twenty-six, on Lower South street, of John Evans' plat of lots, letters "D, E, F," on Lower Water street, in said city of New Albany; also lots numbers fifteen, seventeen, twenty-three, twenty-five, twenty-seven, twenty-nine, in Evans' street plat; and the southern ten feet in front and rear by

one hundred and twenty feet deep of lot number nineteen in said Evans plat; and number forty-nine on Upper Vincennes street in said city, with all the appurtenances; and that, upon the sale of said real estate or of any part or parts thereof, as aforesaid, the equity of redemption of said railroad company in and to the parts so sold shall be forever barred and foreclosed; and if the proceeds of the sale of said real estate should be insufficient to pay said several sums and costs, then the said several persons shall have execution further against any other property of said railroad company subject to execution.

STATE OF INDIANA, *Floyd County, sct:*

I, William Tuley, clerk of the Floyd circuit court, hereby certify the foregoing to be a full, true, and complete transcript of all proper entries made by the clerk, and of all papers pertaining to the action and filed therein, as the same appears of record on the final record-book in our office.

Witness my hand and the seal of said court, affixed at New Albany, June 2, 1869.

[SEAL.] W. W. TULEY, *Clerk.*

Here follows the evidence offered in rebutting by the complainants:

1st. Resolution of the New Albany and Sandusky City Junction Railroad Company, adopted by its board of directors on the 5th day of May, 1854, as extracted from page 29 of the minutes of said board.

"Also, that the president be authorized to negotiate a loan for the use of this company, by making and executing in its name and behalf any notes or bonds for the repayment of such loan at such times and places and at such a rate of interest as may be agreed upon, and to hypothecate the bonds of the city of New Albany belonging to the company, or any portion of them, as security for the repayment of such loan; and, in case of such hypothecation, to agree, if he shall deem it expe-
182 dient, that the holder shall have the privilege, within any named period, to purchase said bonds at a price agreed upon."

Depositions of Thomas L. Smith, John S. McDonald, and John S. Davis, witnesses produced and sworn before me, Henry M. Rowley, a notary public of Floyd County, at New Albany, in said county, State of Indiana, on the 28th day of March, 1868, pursuant to the enclosed notice.

These depositions were taken on the part of the complainants in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein Heman Ely et al. are complainants, and The New Albany and Sandusky City R'road Co. et al. are defendants.

The said Thomas L. Smith, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said cause, deposes as follows:

Ques. 1. State your name, age, occupation, and residence.

Before answering any questions, I state that I appear at the request of the counsel of the complainant, for the purpose of the taking of this deposition as a witness only, and do not waive any objections as counsel for The City of New Albany, or any other party, to the time, place, or manner of taking, or any other objection to this or any other deposition that may be now taken.

Answer to the question 1st. My name is Thomas L. Smith; age, about 63; occupation, attorney at law and solicitor in chancery; residence, city of New Albany, Indiana.

2d. Question by the same. State whether you were a practicing attorney at New Albany, in 1857 and 1858, and what knowledge you have, if any, of a suit about that time determined in the circuit court of Floyd County, Indiana, wherein Victor A. Pepin was pl'ff, The New Albany and Sandusky City Junction Railroad Company, William S. Pearson, jr., Harvey Seymour, and others were defendants.

Answer. I was a practicing attorney at New Albany, in 1857 and 1858. I knew there was such a suit instituted at the October term of the Floyd circuit court, wherein Pepin was plaintiff, and said railroad company, Pierson, Seymour, and others were defendants.

3d. State whether you was an attorney in that case; and, if so, what parties or who you represented therein.

Answer. I did appear as an attorney in that case, and, with my law partner at that time, M. C. Kerr, represented said Pearson and Seymour, who were the trustees named in a mortgage or deed of trust sought to be foreclosed in that suit. We may also have appeared for the railroad company. I cannot now recollect whether we did or not.

Question. What official position did you hold about that time in the New Albany and Sandusky City Junction Railroad Company?

Answer. I was one of thirteen directors of said company. I held no other official position. I had been secretary until October, 1856, when J. P. Allen was appointed secretary.

Question. State whether you was attorney for Heman Ely and others, in the partition suit of bonds bid off by Pepin and Kerr for the bondholders in the suit of Pepin against the R. R. Co. above-named.

Answer. I think I did, with Mr. Kerr, by the name of Smith and Kerr, represent Heman Ely and others in that suit.

Question by same. State whether you were a party in both of the above-named suits.

Answer. I was a party in both those suits.

Question. State what authority, if any, you had to compromise
183 or accept the lands described in the mortgage made by the said railroad company to Pierson and Seymour, as trustees, in satisfaction of the bond or claims represented by the trustees in the foreclosure suit.

Answer. I had no such authority, and did not make any such compromise.

Question. State what you know, if anything, in regard to Pierson and Seymour accepting said lands in satisfaction of said bonds, or of any compromise being made in respect thereto between said Pierson and Seymour, or the bondholders represented by them on one side and the railroad company on the other.

Answer. I have no knowledge on the subject of this question.

Question. State what you know of any satisfaction or extinguishment of the judgment rendered against said R. R. Co. in favor of said trustees.

Answer. I do not know of any satisfaction of the judgment, except so far as the lands received by the parties operated as such satisfaction or extinguishment.

Question. State whether you know of any compromise or settlement being made between the real-estate bondholders upon one side and the railroad company upon the other at any time; and especially whether

you know of any such compromise being made by said Pierson and Seymour or the bondholders represented by them.

Answer. I do not. I have always been under the impression that the bonds held by myself were fully satisfied by the share of the railroad lands received by me, but I have no recollection of any specific agreement made with the railroad company or others to that effect.

Question. Have you any of the books or records of said railroad company in your possession; if so, what?

Answer. There is a book containing the proceedings of the board of directors of said railroad company now accidently in my office. I cannot say it is properly in my custody. I procured it a few days ago from the office of G. V. Howke, esq., for the purpose of examining it.

Question. State whether you know of any record therein of a compromise between said real-estate bondholders and said railroad company.

Answer. I do not.

THOMAS L. SMITH.

The said John S. McDonald, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said cause, deposes as follows:

Question 1. State your age, occupation, and place of residence.

Answer. I am about sixty years of age; banker; residence, New Albany.

Question. State whether you were a director in the New Albany and Sandusky City Junction Railroad Company; if so, how long, and when; and whether you were a party to the foreclosure suit of the real-estate bonds of said company, prosecuted by Victor A. Pepin in 1857.

Yes; I was a director of said railroad co. from its organization up to the it ceased to exist. I was a party to the foreclosure suit bro't by Pepin and others.

Question. State whether you know of any agreement between Pierson and Seymour, or the real-estate bondholders represented by them, on one side, and the railroad company on the other, by which the indebtedness of said company upon said bonds represented by Pierson and Seymour was satisfied or discharged.

Answer. I do not.

J. S. McDONALD.

184 The said John S. Davis, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the said cause, deposes as follows:

Question 1. State your age, and occupation, and place of residence; whether you were an attorney in the foreclosure suit of Pepin v. The New Albany and Sandusky City Junction Railroad Company and others in 1857.

Answer. I am 53 years old; am attorney at law; reside in New Albany. I was attorney for Pepin and others in said foreclosure suit.

Question by same. Were you a director in said railroad company at any time; if so, when? And were you ever attorney for said company; if so, when?

Answer. I was a director during the entire time of its existence. I was attorney for the company during the latter half of its existance, except in said foreclosure suit.

Question. State what you know, if anything, of any compromise or

settlement between Pierson and Seymour, or the bondholders represented by them in said suit and said railroad company by which the amount owing by said company to said bondholders upon their real-estate bonds was satisfied, discharged, or extinguished.

Answer. I know nothing of any such compromise.

Question. State if you know of said bondholders taking the real estate described in said mortgage, or any other real estate of said company, upon any compromise or settlement, or in any other way than by legal proceedings in court.

Answer. I do not know of their receiving anything except what they received by virtue of legal proceedings in court.

JOHN S. DAVIS.

STATE OF INDIANA, *Floyd County:*

I, Henry M. Rowley, a notary public within and for said county, hereby certify that the above Thomas L. Smith, John S. McDonald, and John S. Davis, wer' by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth relating to said cause; that their depositions were reduced to writing by said witnesses in my presence, and under my direction, and said depositions were taken at the office of Butler, Gresham and Butler, in the city of New Albany, county of Floyd, and State of Indiana, on the 28th day of March, 1868, between the hours of 9 a. m. and 4 p. m. of said day.

In testimony whereof I hereunto set my hand and official seal this 30th day of March, 1868.

[SEAL.] HENRY M. ROWLEY,
Notary Public.

185 Be it remembered that, afterwards, to wit, on the 11th day of September, 1871, the complainants filed in said court their application and prayer for appeal, whereupon by order of the Honorable Walter Q. Gresham, judge of said court, the following order was made and entered in said cause, to wit:

Upon the filing of a prayer for appeal herein the clerk of the U. S. circuit court for the district of Indiana, is directed to enter an allowance of appeal in said cause upon the filing of an appeal bond in the penalty of $1,000, with A. G. Porter, surety. September 11th, 1871.

(Signed) W. Q. GRESHAM, *Judge.*

And said application and prayer are in the words following:

In the circuit court of the United States for the district of Indiana.

To the honorable judges of the circuit court of the United States, within and for the district of Indiana, in the State of Indiana:

186 Your orators, John Phelps Putnam, a citizen of the State of Massachusetts, Heman Ely, personally and as executor of the estate of C. Arthur Ely, deceased, a citizen of the State of Ohio, and Stevenson Burke, a citizen of the State of Ohio, now come and respectfully show to your honors that, at the May term, A. D. 1869, of the circuit court of the United States for the district of Indiana aforesaid, in a certain proceeding in chancery, wherein the above-mentioned complainants were complainants and the above-named Thomas L. Smith and others were defendants and respondents, a decree was rendered by said circuit court, in favor of all of said defendants, except said City of New Albany,

and against your orators, from which decree and decision your orators desire to appeal to the Supreme Court of the United States.

The proceedings and decree in said case are of record in this court, and a true and certified copy thereof is herewith presented to your honors, and your orators also present herewith their bond for an appeal duly executed, with Albert G. Porter, esquire, as their sureties,
187 and they pray that your honors will grant them an appeal from said decree to the Supreme Court of the United States as against said Thomas L. Smith, John S. McDonald, Jessee J. Brown, (survivor of James Brooks,) John S. Davis, Benjamin F. Scribner, Horatio N. Duval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephraim Whistler, John Knefley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahon, Lawrence Bradley, James Montgomery, Samuel Montgomery, George V. Houk, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Winstandley, and John B. Winstandley and Jesse Brown, executors of John Brown, deceased, and Augustus Bradley.

Your orators also pray that your honors will make such order for notice to said defendants as the law requires, and that such other proceedings may be ordered and directed by your honors in regard to such appeal as the law and the practice of the court requires.

PORTER & HARRISON & S. BURKE,
Att'ys for Complainants.

188 UNITED STATES OF AMERICA, *ss:*

To the New Albany and Sandusky City Junction Railroad Company, Thomas S. Smith, John S. McDonald, Jesse J. Brown, survivors of James Brooks, John S. Davis, Benjamin F. Scribner, Horatio N. Duval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephraim L. Whistler, William Lockmiller, John Knefley, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahon, Lawrence Bradley, James Montgomery, Samuel Montgomery, Asahel Clapp, George V. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Winstandley, Jesse J. Brown & John B. Winstandley, as executors of John Brown, deceased, and Augustus Bradley, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next, pursuant to an appeal allowed by the circuit court of the United States for the district of Indiana, wherein
189 John Phelps Putnam, Herman Ely, Herman Ely, executor of the last will of Charles Arthur Ely, deceased, and Stevenson Burke are appellants, and you, the said several persons to whom this citation is above addressed, are appellees, to show cause, if any there be, why the decree in the said appeal exhibited and complained of by the said appellants should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness Honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and ex-officio judge of said circuit court, this 11th day of September, A. D. 1871.

(Signed) W. Q. GRESHAM, *Judge.*

190 DISTRICT OF INDIANA:

I, Willard C. Nichols, of lawful age, being duly sworn, do say upon

my oath that, on this 20th day of September, A. D. 1871, I served the foregoing citation upon the Honorable Thomas A. Hendricks, senior member of the law firm of Hendricks, Hord and Hendricks, at their office in the city of Indianapolis, by presenting to him the original and delivering to him a true copy of the same.

(Signed) WILLARD C. NICHOLS.

Subscribed and sworn to before me, the clerk of said court, this 20th September, 1871.

Witness my hand and the seal of said court the day aforesaid.

[SEAL.] J. D. HOWLAND, *Clerk.*

191 UNITED STATES OF AMERICA,
District of Indiana:

I, John D. Howland, clerk of the circuit court of the United States in and for the seventh judicial circuit, and district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy and transcript of the record and proceedings in the cause above entitled as fully as the same remain in said court.

Witness my hand and the seal of said court at Indianapolis, September, 21, 1871.

[SEAL.] J. D. HOWLAND, *Clerk.*

192 Circuit court of the United States, for the district of Indiana.

JOHN PHELPS PUTNAM, HEMAN ELY, HEMAN Ely, executor of the last will of Charles *Antrim* Ely, deceased, and Stevenson Burke,
vs.
THE NEW ALBANY AND SANDUSKY CITY JUNCTION Railroad Company, Thomas L. Smith, John S. McDonald, Jesse J. Brown, survivor of James Brooks, John S. Davis, Benjamin F. Scribner, Horatio N. Duval, Thomas Danforth, Franklin Warren, William S. Culbertson, John B. Crawford, Ephriam L. Whistler, William Lockmiller, John Knefly, Bela C. Kent, Alexander Kent, Michael C. Kerr, Isaac P. Smith, John H. McMahon, Lawrence Bradley, James Montgomery, Samuel Montgomery, Asahel Clapp, George N. Howk, John B. Anderson, Bradford E. Scribner, James Johnson, John F. Anderson, John B. Winstandley, Jesse J. Brown and John B. Winstandley, as executors of John Brown, deceased, and Augustus Bradley. } Appeal in chancery.

193 Know all men by these presents that we, John Phelps Putnam, Heman Ely, Stevenson Burke, and Albert G. Porter, are held and firmly bound unto the above-named appellees in the sum of one thousand dollars, to be paid to the said appellees and to their executors or administrators; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated September 20, 1871.

Whereas the above-named John Phelps Putnam, Heman Ely, and Stevenson Burke, have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the conditions of this obligation is such, that if the above-named appellants shall prosecute their said appeal to effect, and answer all costs that may be adjudged or awarded against them if they shall fail to make good their plea, then this obligation
194 shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.]
ALBERT G. PORTER. [SEAL.]

Sealed and delivered in presence of—
J. D. HOWLAND, *Clerk.*

195 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, J. D. Howland, clerk of the circuit court of the United States in and for the district aforesaid, do hereby certify that the above and foregoing is a true copy of the appeal bond in the cause above-entitled.

In testimony whereof I do hereunto set my hand and the seal of said court at Indianapolis, in said district, this 30th day of October, A. D. 1871..

[SEAL.] J. D. HOWLAND, *Clerk.*

(Indorsed:) Sup. Court U. S. 1870. Dec. term. No. 590. Putnam & al. vs. The New Albany and Sandusky City Junction R. R. Co. & al. Copy of appeal bond. Filed 1st November, 1871.

196 In the Supreme Court of the United States. December term, A. D. 1871.

JOHN P. PUTNAM, HEMAN ELY, HEMAN ELY, as executor of C. Arthur Ely, deceased, & Stevenson Burke, appellants,
vs.
THOMAS L. SMITH, MICHAEL C. KERR, JOHN S. McDonald, John S. Davis, Horatio N. Duval, Thomas Danforth, William S. Culbertson, John B. Crawford, Ephriam S. Whistler, William Lockmiller, Bela C. Kent, Alexander Kent, John A. McMahan, Laurence Bradley, James Montgomery, Walter Mann, George V. Howk, Bradford E. Scribner, John B. Winstandly, Jesse Brown & John B. Winstanley, executors of John Brown, deceased, Augustus Bradley, Jesse J. Brown,
197 Benjamin F. Scribner, Isaac P. Smith, John F. Anderson, appellees.

And afterwards, to wit, on the twenty-fo'rth day of November, A. D. 1871, came the above-named appellants, by Porter and Harrison, and S. Burke, their solicitors, and say that, in the record of the proceedings

aforesaid, there is manifest error of which they complain in this, to wit, that the circuit court of Fredonia found, held, and decided that said appellees were discharged from their said subscriptions by reason of the facts stated in their answer.

2nd. In holding and deciding that, by reason of the facts proved, the said appellees were discharged from their liability upon their stock subscribed for.

3d. In not holding that said appellees were liable and indebted to said railroad company to the extent and in the manner charged in the bill of complaint.

4th. In finding the law & equity of the case with said appellees, and dismissing the bill as to them.

5th. There are other errors apparent upon the face of the re-
198 cord and proceedings aforesaid.

The above named appellants pray that the judgment and decree aforesaid, as to said appellees, may be reversed and annulled, and that a decree may be rendered in said case according to the prayer of the bill of complaint against said appellees, and that such other order and decree be made as justice and equity demand.

PORTER & HARRISON, & S. BURKE,
Solic'tors for Appellants.

(Indorsed:) Supreme Court U. S. 1870, Dec. term. No. 590. Putnam et al., app'ts, vs. New Albany & Sandusky City Junction R. R. Co. & al. Assignment of error. Filed 27th October, 1871.

(Indorsement on cover:) No. 361. John Phelps Putnam, Heman Ely, Heman Ely, ex'r of C. Arthur Ely, dec'd, and Stevenson Burke, appellants, vs. The New Albany and Sandusky City Junction Railroad Co., Thomas L. Smith, John S. McDonald, et al. Indiana C. C. U. S. Filed 27th October, 1871.

JOHN P. PUTNAM AND OTHERS

vs.

THE CITY OF NEW ALBANY AND OTHERS.

IN CHANCERY.

In the Supreme Court of the United States.

ARGUMENT FOR APPELLANTS.

S. BURKE, AND PORTER & HARRISON,

SOLICITORS FOR COMPLAINANTS.

JOHN P. PUTNAM AND OTHERS

vs.

THE CITY OF NEW ALBANY AND OTHERS.

IN CHANCERY.

In the Supreme Court of the United States.

ARGUMENT FOR APPELLANTS.

CONDENSED STATEMENT OF THE FACTS.

The complainants are creditors of the New Albany & Sandusky City Junction Railroad Company. On the 20th of September, 1854, the railroad company executed, and soon after issued, one hundred and ten coupon bonds of one thousand dollars each, falling due January 1st, 1865, with interest at seven per cent.

These bonds were secured upon certain real estate of the company situated at New Albany and were issued as shown by the mortgage executed to secure their payment "to aid in "the construction of its railroad."

Soon after these bonds were executed sixty-seven of them were turned out to Mr. Howard to apply upon work performed by him in the construction of the road, and he soon after sold and disposed of thirty-two of them to two of the complainants in the case and twenty-one to other parties who disposed of the judgments recovered thereon to another complainant in this case.

The company failed to pay the interest coupons July 1st, 1857, and soon after Victor A. Pepin, a holder of some of the bonds, filed his complaint in the circuit court of Floyd county, Indiana, to foreclose the mortgage above mentioned; he made the trustees named in the mortgage, William S. Pierson and Harvey Seymour, with others, defendants. None of the complainants, or those whom they represent, were parties, but the trustees came in and filed an answer, upon which a judgment or decree was entered in their favor for the use of the complainants and those under whom they claim, for the amounts due them on their bonds. This decree was entered at the November term, 1857, of the Floyd circuit court.

In March, 1858, an order of sale was issued to sell the real estate described in the mortgage or trust deed to pay the amount of the decree in favor of the complainants and others, and the property was sold and the proceeds brought into court and divided *pro rata* on the amount found due to each bondholder. The proceeds of sale paid about thirty per cent. of the amount of the debts so secured. Efforts were afterwards made in 1858, and subsequently, to collect the balance due from the foreclosure decree or judgment, but without success.

In 1862 William Lindley, a bondholder who had not been made a party, filed his complaint in the circuit court of Floyd county, Indiana, to foreclose the mortgage a second time. He made the trustees, Pierson and Seymour, the complainants, and all others having liens, the defendants.

This litigation was very protracted, lasting several years and until this bill was filed, and from the doubt these proceedings threw upon the validity of the decree and judgments first recovered, caused a suspension of efforts to collect the balance due on such decree until the filing of the bill in this case.

The indebtedness of the railroad company to the complainants and the amount thereof is settled by the decree in this case in the circuit court, from which no appeal has been taken by the company.

The bill in this case was filed by the complainants to enforce the collection of the balance due to them upon the judgment or decree taken for their benefit in the circuit court of Floyd county, in the names of Pierson and Seymour, trustees. The defendants, Thomas L. Smith and others, stockholders in the railroad company, are made defendants upon the allegation that they are indebted upon their subscriptions to the railroad company.

The case really presents but a single question, and that is whether Thomas L. Smith and his associates have been, by reason of the facts stated in their answer, released from their indebtedness to the railroad company. The answer of those defendants sets forth the grounds on which such release is claimed. It will be borne in mind that under the laws of Indiana special charters are not granted. All railroad corporations must organize under the general laws of the State, and these general incorporation laws require that all railroad companies, precedent to the exercise of corporate powers, shall have capital stock subscribed to the amount of one thousand dollars a mile, or at least fifty thousand dollars, before being incorporated. 1 Gavin & Hord, 504.

The defendants, Thomas L. Smith and others, attach to their answer, (see record pp. 28 and 29,) a copy of the articles of association and subscription made by them upon which the complainants claim they are indebted to the railroad company and liable in this proceeding. This subscription confessedly is in due form of law, and when it was executed, confessedly the defendants were bound to make payment of the several amounts subscribed, and are still liable, unless they have been released. They claim to have been released by reason of the following facts:

First, the articles of association and subscription contain the following proviso, (see pp. 28 and 29) *to wit:*

"Provided, however, and it is hereby understood, that if the "city of New Albany, in its corporate capacity, shall hereafter "take stock in this corporation to the amount of fifty thou-"sand dollars or upwards, inasmuch as the present sub-

"scribers being residents of and owning property in said "city, will then be under the necessity of contributing still "further to the objects of the corporation by way of taxation, "unless a portion of the present subscription is taken off "their hands, the said city shall accept in part of the amount "to be subscribed in its corporate capacity, at its par value, a "transfer of any amount of stock now subscribed for by each "individual over and above the amount of six shares or three "hundred dollars which each such individual may desire or "request shall be so transferred."

Second, On the 31st of December, 1853, the board of directors adopted the following resolution:

"On motion, it was ordered that the original subscribers to "the articles of this company be permitted, in accordance "with the stipulations contained in the articles, to transfer "any amount of the stock so originally subscribed by them, "over and above the amount of six shares or three hundred "dollars, to the city of New Albany; said city having made a "subscription to the stock of said company to the amount of "fifty thousand dollars and upwards, and that the stock thus "transferred be merged in the subscription already made by "said city so that the stock of said city under her present "subscription, with the stock so transferred, shall not exceed "four hundred thousand dollars as subscribed by her."

And that in accordance with such proviso and the above resolution, as early as the first of July, 1854, they each assigned to the city of New Albany all of the stock by them subscribed, except $300 each, and that the railroad company *never charged* them, or either of them, but $300 of their said subscriptions upon its books.

There is no averment in the answer that the city had any power or authority to accept such transfer or to assume the payment of the several amounts of stocks so transferred to it. And there is no pretense that it did in fact accept such transfers and assume to pay for the stock. It is averred in fact *that the city took this stock by reason of having subscribed for $400,000 of stock itself.*

The record shows that the city, November 19th, 1853, formally subscribed for $400,000 stock, to be paid for in its bonds. This subscription was void when it was made, but was ratified on the 7th of March, 1855, under power granted by the legislature, (see p. 65).

The statute conferring this power was special and provided that when the subscription should be ratified, the "subscrip "tions, and the obligations and liabilties, and the corporate "bonds, or obligations, issued or to be issued therefor, by such "city shall be valid."

If the city had any power to take the stock off the hands of Smith and his associates, it was derived from the power conferred by this special act to ratify previous subscriptions.

It is not claimed that in point of fact the city ever did take and pay for one dollar's worth of stock subscribed for by these defendants, nor was it intended that the city should take or pay for any such stock. It was to be "*merged*" in the stock it had previously taken, whatever that may mean.

The raidroad company was to get no money for it and the city was to get no stock. All the stock transferred to the city and "*merged*" was lost to the company and its creditors, and the city got no more than it had already. It is not important what name is given such a transaction. The object is plain. It was to evade the provisions of the Statute in regard to the amount of stock required to be subscribed in advance of incorporation, and to release the subscribers, who had signed the preliminary articles, from the obligations assumed by them.

There is no pretense that any transfer of the stock was made to the city after it ratified its illegal subscription, nor that the complainants, or those under whom they claim, *knew of or ratified*, this arrangement. *

Under these circumstances were the defendants released from their obligations for the stock subscribed?

No question is or can be made in this case as to the original liability of the defendants to pay their subscriptions in full. The stock subscribed by them constituted the security

* ASSIGNMENT OF ERRORS.

The circuit court held that the defendants were released from their liability as subscribers by reason of the facts aforesaid, which holding and decision the complainants assign for error.

2. That judgment was entered in behalf of the defendants instead of the complainants.

required by the Legislature as the basis upon which the company could be organized. Neither is it necessary to discuss the character or value of the proviso in or attached to the articles of association. The statute under which the company was organized offers no such terms or considerations to organizers and promoters of railroad companies. The city of New Albany was not a party to the articles and of course could not be affected by the provisions thereof. It is clear that such a proviso could have no force or effect. The law required the stock to be subscribed as a condition precedent to the organization of the company, and the stock so subscribed must be paid for or remain a debt against some one and be subject to call for the payment of the debts of the company. Such a proviso can have no force or effect to release subscribers from the payment of their subscriptions. The stock thus subscribed could not be taken off the hands of subscribers by the city without the consent of the city, and the city could not take this stock off the hands of the subscribers in sums to suit them and apply the stock thus taken upon its own subscription. That such a condition is void needs little argument. It has been so expressly decided 48 Pa. State 29. We are justified in concluding, therefore, that the subscription of the defendants was in law unconditional, and created an absolute indebtedness against the subscribers to the amount of their several subscriptions, which indebtedness was payable in the future.

Have the defendants been released from such indebtedness?

Such release and discharge is predicated on the following grounds:

1. An assignment in fact made by each of said defendants to the city. In answer to this point it is perhaps sufficient to say that there is no proof whatever that such an assignment as is set up in the answer ever was made to the city. There are no copies of an assignment in the record, nor any other proof by deposition, affidavit, or otherwise, of the fact. What is said by the clerk under the head of "agreement of record" constitutes no part of the record in law, and the court can not

legally take notice of what is therein stated. The rules of the circuit court requires that the evidence shall be taken in writing before the trial in chancery cases, and neither the rules of the court or laws of congress make the certificate of the clerk, as to what was admitted on the final hearing, a part of the record or evidence in the case to be considered by this court. Upon appeal, that this court can not notice such a statement is clear. (See 5 Pet., 248—254. Putnam *vs.* Smith and *al.* U. S. Court.)

"When the record presented simply a judgment in favor "of the defendant in error with regular pleadings to war- "rant it, but nothing to show what evidence was introduc- "ed, the court affirmed a judgment, disregarding a stipulation "between counsel showing what were the evidence and rul- "ings below."

New Orleans *vs.* Gaines, 22 How. 141; to same effect 3 Wheat 101 and 2 How. 392.

"A certificate of the clerk of the court below that a motion was made for a new trial and presenting reasons and certain papers filed on which the motion was founded, from the files of the court, is not a part of the record nor do the reasons on the files of the court become a part of the record by such certificate.

5 Pet. 254; 10 Pet. 368; 13 do 153. "The court does not "consider any paper in cases at common law a part of the re- "cord which is not made so by the pleadings or by some opinion "of the court referring to it. This rule is common to all courts "exercising appellate jurisdiction according to the course of "the common law. The appellate court can not know what "evidence was given to the jury unless it is spread on the re- "cord in proper legal manner."

"The unauthorized certificate of the clerk that any docu- "ment was read or any evidence given, can not make that doc- "ument or that evidence a part of the record." Fisher *vs.* Cockerel, 5 Pet. 248.

If this is the rule at common law how much more should it be the rule in equity cases where the evidence is all required

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to be in writing. Where does the clerk get authority to inform the court that on final hearing any admission or agreement was made unless he gives a copy of such agreement with the signature of parties or counsel and the date of its filing? The record here shows the language to be the clerk's, not the parties'. "Nothing will be considered in this court which is "not brought up in regular order." 20 How. 427, Suydam *vs.* Williamson.

But if the court will notice this so-called "agreement of record," then the question is presented whether the assignment contemplated by the proviso in the articles of association and resolution of the board of directors, and set up in the answer, is valid, and released the defendants from their indebtedness to the company.

Many reasons might be given why such an assignment did not have such an effect. We will point out some of them, and, *first*, that it appears from the face of the resolution of the directors sanctioning the transfer, that it is illegal and void. It is not an honest, legitimate regulation for the transfer of stock, but an ill-disguised attempt to relieve a few favored stock subscribers from the payment of their subscriptions. The whole object from the beginning is plain. The law required that a certain amount of stock should be subscribed in advance of an organization. The organizers and promoters of this corporation intended to evade this requirement of the statute. This is manifest from the proviso in the articles of association and the action of the directors above mentioned. The subscription was intended as a fraud upon the law, and the directors being subscribers, and interested in carrying out the meditated fraud, passed the resolution relied upon.

The general object to release the subscribers without consideration being established, it follows that the attempt to release was ineffectual.

It is well settled that the directors had no power to release the subscribers from their obligations to pay for stock subscribed. This has been often attempted but the courts have uniformly held all such attempts to be *ultra vires* and void. A reference to a few leading cases will illustrate the point

show that the attempted release in this case was null and void.

In the case of 48 Pa. S. Rep., 29, where a direct attempt was made by the board of directors to release stock subscribers under circumstances almost exactly parallel with the case at bar, the supreme court held the following language: "Their (directors') duties were to conduct its — the railroad's "—affairs to the furtherance of the ends for which the com- "pany was created. *They had no power to destroy it, to give "away its funds or deprive it of any means to accomplish the "full purpose for which it was chartered.* Directors of a rail- "road company *are trustees* for all the stockholders, and in a "very just sense, for the commonwealth. *It is an abuse of "their trust, wholly unauthorized and at war with the design of "the charter, to single out some of the stock subscribers and release "them from their liability. No such authority in them has ever "been recognized. It is neither supported by reason nor au- "thority.*"

The principles here recognized are not new; they have become elementary. See A. and A. on Corp., pp. 599 to 606, and cases there cited.

In the case of Curran *vs.* State of Arkansas, 15 How., 304, this court said that "the capital stock of a company is a fund "set apart by its charter for the payment of its debts, which "amounts to a contract with those *who shall become its cred- "itors, that the fund shall not be withdrawn and appropriated "to the use of the owner or owners of the capital stock.*"

In Wood *vs.* Dummer, 3 Mason, 308, Judge Story held that "the capital stock of a corporation *is a trust fund* for "the payment of its debts, and being so, it may, upon gene- "ral principles of equity law be followed into other hands so "long as it can be traced, *unless the holder show a paramount "title.*"

In the case of Ogilvie *vs.* Knox Insurance Co., 22d Howard, 308, this court held that the capital *stock subscribed, whether paid in or not,* is the fund to which creditors may look, and which is pledged for the payment of its debts, and when

that portion of the capital stock not paid in is required to pay the debts of the company, payment can not be withheld unless upon such facts as would authorize the stock subscribers to hold the fund if paid in, as against the creditors.

That the directors of a moneyed corporation have no power to release stock subscribers, or bargain with them for a forfeiture of their stock, was decided in Slee *vs.* Bloom, 19 John. 456. In that case a resolution was passed by the directors that any stockholder, upon paying thirty per cent. of his subscription, might have his stock forfeited. Some of the defendants did so, and claimed a release on that ground. The court, Judge Spencer delivering the opinion, held the resolution void and the stockholders liable, notwithstanding the forfeiture and resolution. The learned judge, in the opinion, says: "Now, could the trustees pass a by-law having the ef-
"fect to deprive a creditor of the company of his only means
"of satisfaction by a resort to the stockholders, until his debt
"was paid? I snswer, without hesitation, that such a by-law
"or resolution is utterly inoperative. *It is an attempt to get*
"*rid of a responsibility which the law and common justice im-*
"*posed on them.*" "I do not stop to inquire by what means
"the resolution was obtained. *I pronounce it to be against the*
"*fundamental principles of law and equity, legally fraudulent,*
"*and therefore, inoperative and void.*"

The case of Mann *vs.* Cooke, 29 Conn. Rep. 178, is a very strong case. Cooke subscribed for forty shares of railroad stock in writting, conditioned that all future calls, after the ten per cent. paid down, should be paid as called for, or the stock should become the property of the railroad company and be sold for its benefit. These terms were known to all other subscribers. Some time afterwards, the company being insolvent, and the greater part of the installments of the stock unpaid, the president of the company made an arrangement with Cooke whereby he was to pay up for twenty shares in full, and be discharged from his liability on the balance. Cooke complied with the terms, and the money was applied for the benefit of the company. It was held in a suit by the

receiver of the R. R. Co. *vs.* Cooke, that such release was invalid, and he was still liable for the balance on his subscription. Judge Church, on page 188, says: at this time was "greatly insolvent and its creditors had a right to insist that "the capital should be kept good and no part divested or "withdrawn."

"This company was formed for the purpose of raising the "necessary funds in money to prosecute and complete a work "of great public utility. The forty shares subscribed by "Cooke was a part of these moneyed funds or capital, and "the public and creditors had a right to rely upon them as so "much money and as a warrant of credit, not only for prose-"cuting the work, *but a fund for the payment of present and "future liabilities of the Railroad Company.*"

Another point in the case at bar was disposed of by Judge Church, in that:

"The suggestion of defendant's counsel that no question "of fraud, actual or legal, can be entertained here, because "fraud is not alleged in the bill, we do not regard. No ques-"tion of fraud is entertained in the bill, or grows out of it, "but it arises solely from the facts set out in the defendant's "answer, and from *these facts* and *their necessary consequence* "we repudiate the relinquishment of the twenty shares as "fraudulent, in law at least."

To the same effect is Ward *vs.* The Griswoldville Company, 16 Conn. R. 593. 2 Barb., 294—6. 6 Hill, 624—9.

In 1866 the same question came before the Court of Chancery Appeals in England, in what is known as the Stanhope case. That court unanimously held such a transaction and release void at the instance of other stockholders, even though not questioned *until fourteen years* after the release and after Stanhope's death. The court will find another similar case in the volume last cited, page 511. *In both of these cases the stock was forfeited for the sake of carrying out the arrangement.* A similar case is reported in 27 Law and Equity Reports, 572, and such a release and arrangement held void on the ground that the agreement was *ultra vires.* The cases reported, 39

Law and Equity, 576; 34 N. Hamp., 124; 5 De Gex, M. & G., 284, 24 Law J. N. S., 130, and 54 Eng. Ch. Rep. 284 all depended upon the same principle, and in every one of them the court held all such releases and arrangements void. We feel confident that no case can be found where it has ever been held that such a release of stockholders was valid. If such a release is to be held valid, what is to become of the rule laid down so often by Judge Story, and other eminent jurists and courts, that the capital stock of a moneyed corporation is a *trust-fund irrevocably pledged to the creditors of the corporation?* as was said by the Court in 15 How., 315, Curran *vs.* Arkansas, and 3 Mason, 308.

If any principle of law can be said to be settled beyond dispute it is that the capital stock of a corporation is a fund sacredly pledged to creditors, and that the courts will not allow any shift or device, by which the creditors shall be deprived of the full benefit of the trust funds, to prevail.

When a corporation becomes insolvent, its officers are trustees for its creditors, and as trustees in charge of its affairs have no power to do any act prejudicial to creditors; they can not release its debtors, cancel subscriptions without full payment, or do any other act beneficial to stockholders and prejudicial to creditors. As trustees for the creditors they are bound to exercise the utmost good faith toward them. They are bound faithfully to collect in the unpaid stock, subscriptions, and notes and bonds, and to apply the proceeds to the liquidation of its debts. These are elementary principles resting upon the plainest principles of justice and equity.

15 Howard, 315; 22 Howard, 380.

2 Redf. on Railways, 624. 1 Redf. 168—70.

If the principles established by these cases is to prevail here, further debate is useless, the decree of the circuit court must be reversed and a decree rendered in favor of the complainants for the amount ascertained to be their due in the circuit court.

2. The release relied upon this case is void also because the city had no corporate power or capacity to accept a trans-

fer of the stock in question. It seems idle to talk about the corporate power of the city to accept and assume to pay for stock which it is not even pretended it assumed or promised to pay for. The answer of these defendants, p. 26, alleges that the stock so transferred by them was made over "as "and for so much of said 8,000 shares of stock so sub- " scribed by said city." That their subscriptions in advance of an organization under the statute were assumed by a subscription made by the city after the organization.

It is enough to say that such a state of facts is utterly impossible. Two subscriptions so utterly unlike can not be the same. A railroad company can not thus "merge" its small subscriptions in a large one.

No process has yet been invented whereby the payment of one subscription will pay not only the debt of the subscriber but also that of other subscribers.

3. It is not true that the city had subscribed, legally, for any stock preceding the time of these alleged transfers. The subscription was void when made and remained invalid until ratified March 7th, 1855. (See Record, p. 65.)

The authority to ratify, as we have seen, was special, and conferred no authority upon the city to do more than sanction what it had already assumed to do.

4. The record shows that the city made an independent subscription of 8,000 shares payable in its own bonds on long time. It did not assume or attempt to assume any cash subscriptions for the defendants or any one else. (See Record, pp. 65—66.)

5. The act of the directors releasing the defendants was void not only upon general principles, but also upon the ground that they were all *personally interested in such release and all availed themselves of its provisions.* (Sec Record, 26 —29.)

It is well settled that directors have no power to act officially on one side where they have an interest upon the other. That in this case they had no power to release others, much

less themselves, from their subscriptions. 1 Redf. on Railways, 581—3; 25 Beauvan 586; 31 V. 1—1; A. & A. on Corp. Sect. 233, note (a) in ninth edition; 61 Pa. S. 202—16; Md. 456; 2 Grant cas. 125—19 Calif. 120; Story Agency, 210—12; 16 Curtiss' Sup. Ct. Decisions, 91; 17 Barb., 132; 20 do., 468; 41 do., 353.

And, finally, It is void as an attempt upon the part of the directors, to allow a *cancellation* of so much stock, a *nominal* transfer to the city, but a *real* blotting out of so much stock, —a transfer that would relieve the directors and their fellows but that would not increase the stock of the transferee. Whatever name may be given such a transaction, its substance and effect, if permitted, would be to reduce the capital of the company and its means of paying its debts, and carrying out the objects of the corporation to the extent of the amount so transferred. The directors have no authority to thus dispose of the effects of the corporation. It is contrary to the statute, 1 Gavin and Hord., 269, sect. 7; and contrary to the decisions of the courts, 48 Pa. State, 29; 27 L. and E., 572, and other cases cited above.

The whole transaction shows that there was no intention to transfer the stock to the city, and have the city receive it and pay for it.

The contrary plainly appears. In substance, the transaction is the same as if the directors had voted to release the subscribers from the performanee of their obligations to pay for the stock subscribed. The statute above referred to provides that in order to complete an organization, at least one thousand dollars a mile, or fifty thousand dollars in all, must be subscribed before organization. This provision is directly annulled, if, as soon as an organization is effected, the directors may release all the subscribers. In this case, preparatory to organization, there was subscribed about $145,000; and if the resolution above named is to prevail, it was immediately released down to $15,500; a sum $35,000 less than the minimum allowed by law.

The city never accepted the assignment alleged to have

been made to it. There is not a particle of proof that the city had any knowledge of such assignments or ever assented to them.

The city had no power to subscribe for stock when these alleged assignments are said to have been made, and no assignment was made after the city had power to subscribe for stock.

There is no room for mistake as to what was intended by the directors, and suffered by them to be done in the resolutions and assignments under consideration. The whole thing was intended to release the *directors and their associates*, who subscribed stock in the organization of the company. The transfer to the city was simulated and unreal, no stock, in reality, ever being assigned to, or accepted by, the city, and none of this stock ever having been paid for, or intended by any one to be paid for, by it. The transfer was unreal; the stock being "*merged*" in the $400,000 subscribed by the city, but so that when transferred the amount held by the city should not exceed $400,000, should not be increased. The stock of the assignor was to be reduced, but that of the assignee was not to be increased.

The subscribers were to assign the stock without paying for it, and the city was to receive it without paying for it, and without increasing the stock already held.

Of course it is plain that the directors intended that the railroad company should get no money for such stock as might thus be assigned to the city, and that the city should get no stock, and be called upon to pay for none by reason of any such assignment.

Practically, such an assignment and transfer does not differ from a resolution of the directors expunging the subscriptions and relieving the subscribers from payment.

Why take the trouble to assign to the city, to "merge," or get rid of it? Why not cancel it directly, squarely and manfully?

We think it clear that the directors could not thus release any stock subscriber, *but very clear that they could not thus release themselves.*

II. The release relied upon being void, and the stock subscribers liable notwithstanding such attempted release, have the complainants lost their remedy against them by reason of any laches or delay on their part? We say they have not.

In order to ascertain whether the complainants were guilty of laches or unreasonable delay in instituting this suit we must look at and duly consider all the facts and circumstances connected with their judgments and claims. In the first place it is proper to bear in mind that the judgments which they seek here to collect were not taken in their names but in the names of Pierson & Seymour, the trustees named and chosen by the railroad company. That the paper upon which the judgments were rendered *did not fall due until the first day of January, 1865.* (See Record, p. 36.)

The complainants were all non-residents of Indiana, and some of those under whom the complainants claim were married women. In the case of C. Arthur Ely, one of the largest creditors, the greatest injustice would be done by holding the debt due to his estate barred by delay. He was insane from some time in 1858 up to his decease which occurred in 1865.

On the 19th day of February, 1863, William Lindley instituted in the circuit court of Floyd county, Indiana, his suit to foreclose over again the very mortgage upon which the complainants' judgment had been recovered. The complainants, and those under whom they claim, were made parties defendants. Walter Mann, John S. Davis, James Montgomery, John S. McDonald, and many other defendants in this case, were made defendants in that suit, (see record, pp. 119, &c.) Mann, Davis, Montgomery and McDonald all united in that case in a demand for a new judgment of foreclosure, claiming the first judgment invalid, and ultimately Victor A. Pepin's representative also demanded a new foreclosure. This action went to the validity of the judgments first recovered and here sought to be collected, and of course caused a suspension of all attempts to collect the balance due until the result of that suit was made known.

As will be seen by the record of the case, which is known in these proceedings as the Lindley case, (see record, pp. 119 to 168,) the questions presented were new and difficult and the case was not finally decided until February, 1868, the date of the filing of the bill in this case.

The last execution on the judgments of the complainants was issued August 6th, 1858, and returned December, 1st, 1858, (see record, pp. 66—67,) only about three years before the commencement of the Lindley suit. In the mean time the rebellion broke out and the attention of almost all men was drawn away from business and given to the great contest. Under such circumstances, scattered far and wide as the owners of the judgments were, holding bonds that did not by their terms mature until 1865, and the judgments being by and in the names of the trustees, and in a case in which the owners were not even parties, could they justly be accused of laches in not bringing this suit before the Lindley suit was terminated, even if they had known of the situation of the defendants' subscriptions, which it is not pretended they did?

In addition to these facts, there are three good and sufficient reasons why the lapse of time should not bar this action:

First, the subscriptions were made upon the articles of association which are required by law to be filed in the office of the Secretary of State, (see 2 G. & H. 291,) and were never carried on to the books of the company. See record, p. 70, and deposition of Thos. L. Smith, question and answer 31, p. 97. The complainants, therefore, never learned the condition of such subscriptions. They had no access to the books and records of the company, in fact, and not being stockholders, they can not be charged with constructive notice.

Second, The facts upon which the release and defence depend are of record and are as susceptible of proof to-day as at any previous time.

Third, In enforcing legal demands, courts of equity act in analogy to the statute of limitations; in all such cases courts,

of equity neither extend nor contract the time fixed by the legislature. If the claim is not barred by the statute of limitations and is enforcable at law, courts of equity will enforce it. There can be no acquiescence in the release claimed here —no standing by and seeing the defendants change their position upon the faith of complainants' acquiescence. *It is not so much as pretended that the complainants, or those under whom they claim, knew or ever heard of the pretended release until a few days before this suit was commenced.*

Under such circumstances the least time that could bar a claim in equity is the time fixed by statute, twenty years from the time the cause of action accrued, (see 2 G. & H. 159). This doctrine is elementary and settled by many decisions of the courts. See 2 Story Eq. 4th Ed. par. 1520 to 1522 and notes. Horendon *vs.* Lord Amesly 2 Sch. & Sefr. 630, (opinion by Lord Redesdale.)

Nothing said by the court in this case, when the liability of the city was considered, conflicts with this position. The court held that the release of the city *was a public act of which we had notice and which we were bound to attack within a reasonable time after such notice. No notice is even pretended here.* Neither can it be successfully urged that the claim is barred by the statute of limitations in regard to frauds, 2 G. & H., 158. The complainants are here asking the court to compel the defendants to pay a debt which might have been collected in an action at law by the railroad company or by a receiver appointed by the court. Suppose an action at law to have been commenced against them by the company or a receiver, instead of this suit. Upon what would the action have been founded? Clearly upon the subscription—the contract in writing. The defense set up would be the release, and, if the facts were stated as they appear here, the defense would be bad on demurrer If any fraud appeared in the case it would be in the answer, and the fraud of the defendants. And clearly it can not be maintained that a defendant can shorten the time within which the holder of his promise to pay can bring suit, by a fraudulent attempt upon his part to get rid of

Strictly speaking, there is no statute of limitations in equity, but where legal rights are sought to be enforced in equity, courts of equity act in strict analogy to the statute, and give or deny relief according to the time limited by the statute. In exceptional cases, courts of equity will grant relief even where the demand is barred by the statute, or deny relief where it is not. But such cases are rare, and depend on special circumstances. As a general rule, courts of equity act in analogy to or obedience of the statute of limitations. Angell on Limitation, Sects. 25 to 30, and notes; 52 Ill. 454 and 299; 7 Bush (Ky.), 95.

Where the complainants have been guilty of gross laches—of sleeping upon their rights—courts of equity will refuse relief from its inability to do justice between the parties, if, in the meantime, the original transactions may have become obscured by time and the evidence lost. Ferson *vs.* Sanger, 1 Davies (U. S.), 252. Mason *vs.* Crosby, 1 W. & M. (U. S.), 342. Kerby *vs.* Jacobs, 13 B. Monroe, 435 do 406.

But if fraud exists, or the delay is satisfactorily accounted for, or such a course would work injustice, the lapse of time short of the statute is no bar. Warner *vs.* Daniels, 1 W. & M. 90; 52 Ill. 299.

Unless there is something very unusual and special in the facts of a case, courts of equity will follow the statute of limitations. Kane *vs.* Bloodgood, 7 Johns, Ch. R. 90; 4 Mason, 139; Baldwin C. C. Rep. 419; 2 Story. Eq. 1521.

When the two courts have concurrent jurisdiction, and the aid of a court of equity is invoked on account of special circumstances, such as the need of a discovery, or the like, or the difficulty of proceeding at law, courts of equity will follow the statute unless fraud intervenes, when the court will give effect to the statute only from the discovery of the fraud. 2 Denio, 577, Lawrence *vs.* Trustees, &c.; 10 Gill & Johns, 217, Tiernan *vs.* Rescaimes, Adm'rs.

If any principle can be said to be settled beyond all question, it is that no one can be accused of laches or sleeping upon

faction were procured by fraud, it would be as correct to say that the action was predicated upon the special matter contained in the replication as to say that this bill is in any sense predicated upon the fraud necessarily involved in the release set up.

In each case, the action is predicated upon the indebtedness and the matters in avoidance of the answer are relied upon simply to prevent the matter set up in the answer above being available as a defense.

In short, our action rests not on defendants' fraud, but on their contracts, and when they set up their insufficient or fraudulent release, we say your release is good for nothing; you are still liable on your contracts, notwithstanding your attempted release and fraud. Your contracts were good when made, and are still good. Your own fraud don't relieve you nor affect your liability either way.

the liability altogether! Unless some such rule as this can obtain the statute in regard to relief against fraud may be left out of the case; this action is not brought for relief against fraud but to compel the defendants to pay their honest debts, due upon contracts in writing, and no frauds, attempted or real, should be allowed to abbreviate the time specified in the statute within which such suits may be commenced.

The statute of limitations did not begin to run upon these claims until the company became insolvent, no previous call having been made, perhaps not until a reasonable time for the appointment of a receiver after insolvency. If so, these demands would not have been barred until some ten years after this action was commenced. If the cause of action accrued at the date of the subscription the claims would not be barred for five years after this suit was commenced. If we were seeking to enforce a demand barred by the statute by the aid of this court, the court might well refuse to interfere, but upon what equitable ground can the court refuse a clear legal demand? Why refuse to compel payment of an honest debt of more than $70,000, from the capital which the law set apart for its payment? This capital was pledged to the complainants and other creditors. The bonds upon which the judgments were recovered were turned out to the Howards in payment of work done in the construction of the road, (see record, p. 92, ans. 6, also p. 47, ans. of C. & S. Howard, ,) and such debts, under the laws of Indiana, must be paid; if they can not be paid from the assets of the company, the stockholders are personally liable. 1 G. H., 517, Sect. 38.

We think it clear that none of the defendants have been released from the liability assumed by them, either by the colorable assignment and transfer to the city or by the alleged laches or delay of the complainants. As it is plain in this case that a denial of relief in equity would result in utterly defeating the complainants and depriving them of the collection of their debts, we think the court should be satisfied that the delay was so great as to work serious injury to the defendants. But how can the court come to the conclu-

sion that there was the least delay or negligence upon the part of the complainants as to these defendants?

As to the city, the compromise having been published in the newspapers, there may be some sort of excuse for the charge of laches. But in regard to these defendants, no such charge can justly be made. The complainants surely could not have instituted proceedings in equity until December, 1st, 1858, when they exhausted their remedy at law by the return of execution *nulla bona.*

Nor could they well institute such a suit until they had learned of the indebtedness of the defendants. They did not in fact learn of this until a few days before they commenced suit, (see record, p. 85,) and then it was discovered almost by accident upon the trial of the Lindley case.

Where would the complainants have looked for equitable assets to satisfy their judgments? One would naturally say in the books of the company, but the evidence here shows that but $300 on each of these original subscriptions was ever charged to the defendants. None of the stock pretended to be transferred by them to the city ever stood in their names upon the books of the company, nor did it ever stand upon the books of the company against any one. Under such circumstances the most a very diligent man could do would be to bring suit as soon as he made the discovery. This we did. And as we made the discovery before these debts were barred by the statute, we consider ourselves in time. The complainants, equity to have their debts paid is surely quite as strong as the defendants, to be released by the means adopted by them, and if the equities are equal the legal right shall prevail. And here allow us to say again that our demand rests upon judgments of record recovered upon the bonds of the company and upon contracts in writing of the defendants, and in no respect upon the fraudulent attempt to get released set up in the answer, and that the time within which a suit can be brought upon a legal written contract can not be abridged by a fraudulent attempt to get rid of the contract altogether. No precedent for such a ruling can be found. It is contrary

to reason and authority. We conclude, therefore, that the defendants are still indebted to the railroad company as alleged. Can such indebtedness be subjected in this proceeding? Several objections are interposed.

First, That we have no money judgment.

Second, That this court has no jurisdiction, and

Third, That we have an adequate remedy at law under the local statute, and

Fourth, The judgment in the Lindley case.

We will notice each of these points briefly in their order. As to the *first*, that the complainants have no money judgment and that there was no order of execution for the balance due after the sale of the real estate, it is sufficient to say, that the complainants recovered a money judgment against the railroad company; (see page 40, printed record,) where, after reciting the amount due to each complainant, "each of said sums to be levied," &c., the entry proceeds, "It is now, "therefore, finally considered and decreed by the court, that "the said William S. Pierson, Jr., and Harvey Seymour, as "such trustees, and for the use aforesaid, do recover of said "company the sum of fifty-four thousand eight hundred and "fifty-five dollars and costs, each of said sums to be levied "and collected as aforesaid."

That after the sale of the real estate upon the judgment and decree, and the return of sale made by the special master commissioner, the court approved the sale and ascertained the balance due to the creditors, and *awarded execution* for the balance of the judgment or decree. (See record, page 58.)

The case, it will be noted, was still pending in court, having been continued from the October term, 1857. (See record, page 53.)

Thereupon, on the 6th day of August, 1858, execution was issued to collect the balance due on said judgment, and the sheriff levied upon and sold certain lands of the company, thereon applied the proceeds, and returned the writ Decem-

ber 1st, 1858, unsatisfied, no goods, chattels, lands or tenements found, from which he could satisfy the same. (See record, pages 66 and 67.) And, finally, the court in the Lindley case, found that a valid recovery was had on the bonds and mortgage, and that all the mortgaged premises were sold thereunder, and the sales approved by the court, thus again judicially recognizing the validity of said judgment. (See page 167, printed record.) A judgment thus so uniformly treated as valid where rendered, we do not suppose can here be questioned.

Second, That the circuit court had no jurisdiction of the subject matter of the action.

This precise point having been expressly decided by this court in 18th How. 253 to 263, and 21 How. 582, and acted upon without question in the case of Ogilvie *vs.* Knox Insurance Co., reported first in 22d How. 380, and again in 2d Black, 539, and which case was appealed from the circuit court of Indiana, and was a creditor's bill predicated upon numerous judgments recovered in the state circuit court of Indiana, we had supposed the question of jurisdiction would not be further pressed upon the attention of the court.

Long before either of these cases was decided it was a familiar principle of equity jurisprudence that a court of equity had jurisdiction to enforce not only its own decrees but the judgments and decrees of other courts. Story's Equity Pleadings, Sec. 426 to 431; Mitford's Equity 95; Cooper's Equity 98 and 99. Hitherto it has not been supposed that a court of equity has no jurisdiction to enforce a judgment rendered in another court. Such jurisdiction has been exercised without question by all courts clothed with equity powers.

Third, That we have an adequate remedy at law under the local statutes of Indiana. In answer to this objection, it is sufficient to say that the jurisdiction of the circuit court, and its authority to entertain such bills, does not, in the least, depend upon the statutes of Indiana. This court was not created, nor its jurisdiction regulated by the legislature of Indiana. The courts of the United States have jurisdiction in equity,

derived from the constitution and laws of the Union, which is uniform throughout all the states. Robinson *vs.* Campbell, 3 Wheat, 213—221. Neves *vs.* Scott, 13 How. 298. Fitch *vs.* Creighton, 24 do. 159. Noonan *vs.* Lee, 2 Black, 499. 21. How. 583. 2 Summer, 401.

A remedy at law, allowed by the local or state statutes, will not defeat the equity jurisdiction of the federal courts. U. S. *vs.* Howland, 4 Wheat, 108. Such jurisdiction has been exercised by the U. S. circuit court in Indiana, in a case parallel to this, affirmed in this court. Ogilvie *vs.* Knox Ins. Co., 22 Howard 380. 2 Black 539.

The federal courts may entertain a creditor's bill in virtue of their general equity jurisdiction. 6 McLean 16. 4th do. 18, 122, and 568.

It is perhaps unnecessary to say here to this court that the jurisdiction of the federal courts does not, in the least, depend upon the local statutes of the states, but that it is derived from the constitution and laws of the Union, and is not subject to be abridged, limited or abolished by state legislation. That such court possess as full jurisdiction in one state as in another, without regard to local statutes or the practice of local or state courts. It being the settled practice of the courts of chancery of England to entertain such bills, and of the federal courts exercising a similar jurisdiction to entertain such bills and grant the proper equitable relief.

The plain and adequate remedy at law, that will defeat a creditor's bill in the United States circuit court, must be *such a remedy as may be enforced in such court.* Clearly parties having a right to sue in equity, in the United States courts are not compelled to adopt the remedy at law provided by the local statutes.

Fourth, As to the fourth point that we have no subsisting judgments and are precluded by the judgment in the Lindley case. It is sufficient to say that the amount due to the complainants was referred by the circuit court to a special master who made his report thereon showing a debt in the aggregate of more than $70,000, which report was not excepted to

by any one and was confirmed by the court and a decree rendered thereon. We suppose these facts establish the indebtedness of the company and that the only question here is whether the defendants are indebted to the company and whether the court has jurisdiction to grant the relief demanded. If, however, it is insisted that the complainants compromised their claims for the real estate bid in upon the master's sale, we ask the court to read the testimony upon that point, and we insist that there is no evidence whatever of any such compromise. It is conclusively proved that no such compromise ever was so much as proposed or mentioned. See record, pp. 83, 84, 115—131, 132, 162.

In regard to the Lindley judgment relied upon, a brief statement of the facts will enable the court to fully understand the nature of this defense. As we have already seen from the record of the proceedings in the case of Victor A. Pepin *vs.* The N. A. & S. C. J. Railroad Company and others, heard and decided by the circuit court of Floyd County, Indiana, on the 14th day of November, 1857, (see printed record, 33 to 62,) a judgment was rendered by that court in favor of the holders of the one hundred and ten bonds secured by mortgage upon certain real estate of said company, described in the mortgage or deed of trust, a copy of which will be found in the record, (see pages 36 to 44.) All the parties were before the court in that case who had or claimed any interest in the bonds secured by that mortgage, except William Lindley, who afterwards claimed to own three of the bonds represented by Pepin in the first suit, and upon which Pepin had been allowed to recover judgment against the railroad company.

Under this decree or judgment, rendered November 14th, 1857, in favor of Pepin, the complainants and others, all the real estate described in the mortgage or trust deed executed to the trustees, Pierson and Seymour, had been sold by a master commissioner of that court and the sale approved by the court, deeds made to the purchasers, and the proceeds applied upon the judgments rendered in favor of the various holders of bonds, (see record 53 to 58). The judgment

creditors in that case having empowered said Pepin and M. C. Kerr, Esq., to bid off so much and such parts of said premises for them as they deemed expedient, they bid off all but a few small pieces, less than sufficient to pay the costs, and in the language of the master in his report, page 58, the judgment creditors or "those beneficially interested in the "judgment or decree agreed to take the real estate so pur- "chased by Pepin and Kerr at the *prices aforesaid, (for which "it was sold by said master) as so much cash upon said judg- "ments and decree.*" And afterwards, October 20th, 1858, said judgment creditors partitioned said property among themselves, (see answer of R. R. Co. and evidence of Judge Smith, page 95, answer 21,) and so held it up to the 19th day of February, 1863, when William Lindley wholly ignoring said first foreclosure and sale, and the proceedings in said suit commenced by Pepin, filed his complaint in the Floyd circuit court to procure a foreclosure of said trust deed or mortgage executed to Pierson and Seymour, trustees. In this case Lindley made the railroad company complainants, Pierson and Seymour, trustees, and all persons interested in the real estate embraced in the trust deed or mortgage, parties.

This case was pending in court until the 18th day of February, 1868, when it was finally disposed of, by the court rendering a judgment or decree, which will be found in full in the printed record, pages 166 to 168.

The sole object and purpose of the Lindley case was to foreclose the mortgage or trust deed executed to Pierson and Seymour. His complaint is in the ordinary form of such complaints in Indiana. He wholly ignored the former proceedings instituted by Pepin, and when those proceedings were set up by the complainants and others—(see record pages 128, 129 and 130 to 132)—in defense of the title to their lands acquired thereunder, he claimed that such proceedings were void. The sole object and purpose of the persons, who are here complainants, in setting up the former foreclosure and sale in the Pepin case as a defense against Lindley's complaint, was *to prevent a new foreclosure of the*

mortgage, and a sale of the lands which they had purchased under its sanction. The answers of Pierson and Seymour, Ely, and others, on pages 125 and 128 to 132 of the record in this case, and the answer of the railroad company in the Lindley case, on pages 162 and 163, all show that the judgment in the Pepin case, now sought to be enforced here, was relied upon there only as a defense against a new foreclosure, and that no affirmative relief or relief of any kind, was demanded against the railroad company or any one else upon account thereof, and that no facts were stated upon which any such relief could have been demanded. The sole object of referring to the judgment was to protect the title to the lands acquired thereunder.

Indeed there was not in the Lindley case any issue of fact whatever, in the pleadings or in the testimony, between the complainants or those under whom they claim, and the railroad company.

The complainants, Putnam, Ely and others, in their answer, pages 130 to 132, set up the recovery of the judgment in the Pepin case, not even naming the amount thereof, and the sale, confirmation of sale, master's deed, and partition among themselves of the lands bid off by Pepin and Kerr, and set up that they had received nothing upon said decree in their favor except the lands so bid in by Pepin and Kerr for them, and to use their words "*That the balance of said decree in their favor respectively remains wholly unpaid*, and said railroad company is wholly insolvent and has no property from which the balance can be made." And the railroad company, on page 162, in its answer, says "*that all the matters and things stated in the answer of her co-defendants, Pierson and Seymour and John P. Putnam, Samuel F. Andrews* and others, are true." Here then is not only no denial of anything said or claimed by Putnam, Ely and others, in respect to the Pepin judgment, *but an unqualified admission of the truth of every word stated in their answer.* And this is every word that is said by the complainants, the railroad company, or any one else in the Lindley case, from first to last, about

the balance due, or about the judgment or decree in the Pepin case, except some general allegations by the other parties in respect to the validity of the decree because Lindley was not a party.

After the trial of the Lindley case, and while the court held the case under advisement, Putnam, Ely and others, fearing that the court might disregard the decrees of foreclosure in the Pepin case, filed suplemental answers—not withdrawing their former answers—in which they said that they severally owned the bonds described in said mortgage, respectively owned by them, so that if the first decree was disregarded they would suffer as little as possible by such ruling, and some of them prayed the same relief prayed for by the plaintiff. These answers will be found on pages 165 and 166 of the record in this case; an examination of them will show that they were filed out of abundant caution to be in position to suffer as little as possible if their former defenses were overthrown. And that the court and railroad company so regarded them is very clear from the fact that *the railroad company filed no reply thereto and took no issue thereon.* Indeed, as we have seen, the answers were filed *after all the evidence was offered and the case argued.* Hence there can be no truth in the pretended verbal agreement sworn to by Smith and Howk, as there was no evidence offered by any one *after* such supplemental answers were filed. See page 164, where it appears that the evidence was offered from the 16th to the 19th of December, 1867; the case argued January 27th, 1868, and adjourned until the 18th of February, 1868, when the answers were filed and the case was finally decided.

But whether these supplemental answers were to be considered in or out at the time of trial can make little difference as *no issue was taken by any one upon them, and there is not one word in them from first to last about the Pepin decree or judgment,* or whether it had been paid, discharged, or extinguished or not. Hence, what we have said before is fully and completely supported by the record, that there was *no issue in the Lindley case* between the complainants or those under

whom they claim, and the railroad company, upon any fact; but that every allegation in respect to the decree and the balance due upon it was in that case by the railroad company solemnly admitted of record by its answer to be true.

There was not only no issue in regard to the payment or satisfaction of the decree rendered in the Pepin case, which we here seek to enforce, made in the Lindley case, but the fact of such payment or satisfaction was not so much as named or discussed on the trial, *not a word was said about it by witness*, party or attorney. See evidence of defendants, Smith, McDonald and Davis, on pages 182 to 184.

The complainants litigated nothing with the railroad company in the Lindley case. Their interests were identical, and both acted together to defeat a new foreclosure of the mortgage.

The first word in the record in the Lindley case about the complainant's decree in the Pepin case having been paid or satisfied is in the decree made *after* this action was commenced. Nothing of this sort appeared in the *pleadings or evidence and nobody pretends that such was the fact.*

But this paragraph in the decree in the Lindley case, about payment and satisfaction of complainant's decree, not only is outside the issue, unsupported by any evidence, and false in fact, but is utterly inconsistent with all the other facts in the decree rendered in that case, and with the records in the Lindley and Pepin cases.

As we have already seen, the sole object and purpose of Lindley's complaint and suit was to procure a foreclosure of the mortgage to Pierson and Seymour, which had been previously foreclosed in the Pepin case; and *the only issue in the Lindley case was whether the foreclosure and sale in the Pepin case was valid.* The complainants, in this case, set up as a defense, in the Lindley case, the foreclosure proceedings in the Pepin case. Lindley denied the binding effect of that foreclosure as he was not a party, and the case was heard and decided upon that issue. The court (see pages 166 to 168) found in the decree, here relied upon as a bar, that on the

14th day of November, 1857, in the Pepin case, "a judgment "was rendered and a recovery had *upon the mortgage described "in the plaintiff's complaint, and each and all of the bonds "mentioned and enumerated in said mortgage, that under said "judgment all of the premises described in said mortgage had "been sold and conveyed, and such sales and conveyances ap- "proved and confirmed by the court.*" Then follow the words relied upon here as a bar, "That by the agreement of the "parties to said judgment, who were then the holders of said "bonds, and the said railroad company, the said mortgaged "premises were received by them in full payment, satisfaction "and extinguishment of all claims and demands on said bonds "and mortgage, and of the said judgment so rendered there- "on, as aforesaid."

Whereupon the court finds that before Pepin commenced his suit, he pledged to said Lindley three of the bonds, of $1,000,00 each, as collateral security for a loan of money, and that there was a large amount due from Pepin to Lindley on said loan, and that Pepin had taken judgment on seventeen bonds, three of which were the bonds thus pledged to Lindley, and that, therefore, he was a trustee for Lindley for three-seventeenths of the land acquired by him by virtue of said foreclosure, and Lindley was thereupon allowed to *amend his complaint* so as to treat Pepin as his trustee for 3-17ths of the mortgaged premises set off to him, and a decree made that 3-17ths of the real estate so set off to Pepin be sold, and the proceeds applied, first, to the costs of the Lindley case, and the balance to satisfy the amount found due from Pepin to Lindley, and as to all other parties the proceedings were dismissed.

This is the whole of the Lindley decree. The case was instituted to foreclose a mortgage; the court found that it had once been legally foreclosed, and hence it could not be foreclosed again, but found that the complainant, by amending his complaint, was entitled to certain other equitable relief, which, the complainant having made the amendment, was duly decreed to him. But what had "the full payment and

satisfaction of the judgment" in the Pepin case to do with the decree in this case? Was any such fact necessary to uphold the decree? Who had submitted to the court any such question? The question of a prior foreclosure of the mortgage and sale of the mortgaged premises was submitted, and he found, precisely in accordance with the answers of Putnam, Ely and others, that such mortgage had been foreclosed, and that the proceedings, including the sale, were all legal and valid. Having found these facts in accordance with the issues, and in affirmance of the judgment we here seek to enforce, the court proceeded to find, outside the issue, that the same lands were taken by the judgment creditors by agreement to receive them in full payment for their bonds, mortgage and judgment rendered thereon. These findings are utterly inconsistent, the one with the other, and the latter outside the issues, and in conflict with the conceded facts in the answer of the railroad company.

In concluding this point, we submit, that it is indispensable to an estoppel by judgment or decree that the same identical question presented should have been decided in the preceding case, that complainants in another action should have demanded an enforcement of the same demand they here seek to enforce.

To constitute such an adjudication as will be an estoppel, there must be "*identity of the thing demanded; identity of the* "*cause of the demand*, and of the parties in the character in "which they are litigants, and the judgment must be on the "same subject matter, and for the same purpose." 24th How. 341—2.

"*It it not the recovery, but the matter* alleged by the party, "and upon which the recovery proceeds that creates the es- "toppel." 3rd East, 355.

"It is only where *the same question* has been determined, "that the former judgment is a bar." 21st Ind. 153.

"Judgments are co-extensive only with the issue, and con- "clude nothing not necessarily embraced therein," 31st Conn. 417, 423, 12th do., 365—373.

"The former judgment is conclusive only as to the matter "which was directly in issue in the former trial. The points "in issue must be the same, and the judgment is conclusive "only upon the matter which was directly in issue in the pre- "vious action. By matter in issue is meant that upon which "the plaintiff proceeds by his action, and which the defend- "ant controverts by his pleadings." 43rd N. H. 495, 6 Foster, 552.

"The test of identity of subject matter is, will the same "evidence support each action?" 7th John's, 20; 8th do 383; 6 Hill, 114 and 139; 2d Edwards, 417; 2d Phil. Ev. 16; 2d Abbott Nat. Dig. 554.

"Facts stated, or found by a court or judge, are not bind- "ing upon the parties unless embraced in the issue." 12 Conn. 417; 9 Cush. 348; 2 Gray, 399; 7 do. 409; 6 Pick. 147; 15th do. 276; 9 Cush. 255; 21 Ind. 151; 2 do. 269; 3 Day, 138; 8 Conn. 268; 25 New York, 613; 3 Wall, 704; 99 Mass. 493; 3 Sum. 20; 1 Story, C. C. 474; 2d Wall. 35.

The case in 3d Wallace is in point. The court there say; That "the language of a decree in chancery must be con- "struted in reference to *the issue* which is put forward, by "*the prayer for relief and other pleadings.*" Speaking of the decree, the court says: "We think a decree having such an "effect could not have been properly rendered *upon the plead-* "*ings and issue* in that case."

The rule is well settled by the foregoing cases, that to constitute an estoppel by judgment *the two actions must be identical.* The allegations and demand must be the same. That the parties are bound by what *they have alleged* rather than by what the court has said, in making the decision; that the parties are never bound by facts found, or remarks made by the court *unless such facts are in issue, and mentioned* as the basis of the judgment.

Applying these principles to the question here presented, it will be seen that the estoppel pleaded in this action is defective and insufficient for the reasons following:

First, The causes of action are not identical. The

present action is predicated directly upon the decree or judgment of November 14th, 1857, in the Pepin case, and is prosecuted for the sole purpose of collecting the balance due to complainants upon that judgment or decree. Nothing of the kind was attempted in the Lindley case. The Lindley action, in which the decree relied upon was rendered, was prosecuted for the sole purpose of foreclosing the mortgage to Pierson and Seymour, foreclosed in the Pepin case, and the complainants here, who were defendants there, set up the decree and proceedings in the Pepin case for the single purpose of protecting their title to the lands set off to them under such decree and proceedings. So far as the complainants were concerned that case was one in which they had *no interest other than to defend the title to their lands acquired in the Pepin case*, and they neither sought nor demanded any affirmative relief of any kind against the railroad company, its stockholders or debtors.

Secondly, There was *no issue between the complainants and the railroad company in the Lindley case.* Their interest and pleadings were identical. The complainants here, who were defendants there, pleaded the former foreclosure as a defense to their land titles acquired under it. And the railroad company in its answer adopted the answer of the complainants as its own, and solemnly admitted of record that every word said by the complainants, about the judgment or decree in the Pepin case, was true.

Thirdly, In point of fact there was no question touching the payment or satisfaction of the judgment or decree, now sought to be collected, litigated in the Lindley case. The defendants, Smith, Davis and McDonald, all so swear, (see pages 182 to 184 printed record) and *no one* swears that any such question was *even named on the trial.*

Fourth, No one pretends that *in fact* the holders of the bonds, and judgment of November 14th, 1847, ever did agree to accept the bonds, described in the mortgage, in payment and satisfaction of such judgment. No witness swears that

there is a word of truth in any such statement, and Ely, Smith, McDonald and Davis swear that such a proposition was not so much as even named to their knowledge.

The records of the railroad company fail to show any such compromise or proposition; *and the records in the Pepin case show that the lands were not so taken, but were taken at what they sold for at master's sale, and execution was ordered to be, and was, issued for the balance, $85,319,00.* (See printed record, p. 58.)

Fifth, No question of payment or satisfaction of such judgment or decree *could* have been made or litigated in the Lindley case, under the issue.

" Courts can not, even by eonsent of the parties, pass upon " questions not raised by the pleadings." 14th Calif. 27.

" Evidence of payment or satisfaction of a judgment, debt " or demand is not admissible under the general issue." 13th Ind. 63; 9th do., 273; 10th do., 407; 29th Barb., 170; 14th Ind., 528; 12th Iowa, 459; do, 563; 16th Ind., 206 and 341; 15th do., 365.

Sixth—The fact that the judgment was not paid, if at all material in the Lindley case, was conclusively settled by the pleadings; it being averred on one side and admitted on the other,—10th Ind., 302; do., 566; 9th do., 252; 4th Iowa, 587; and no evidence will be received to show that a fact thus confessed was litigated; such evidence would contradict the record, showing that the case was heard on the issues joined.

3 Pick., 434; 2 do., 20; 17 do., 7; 3 Wend., 27 to 55; 4 Ct., 276; 7 do., 377; 2 Johns, 24; 3 Wall, 709; 8 Wend., 45; 3 Comstock, 173; 9 Cush. 348.

Seventh—The facts relied upon as an estoppel do not constitute the basis of the judgment or decree rendered, are not necessary to uphold it, but are in conflict with the decree as actually rendered—see page 167 of record, where it appears that the whole decree is predicated upon the fact that Pepin acquired certain bonds by *virtue of the decree*—which we here seek to enforce. If the former adjucation, here relied

upon, is to prevail, well settled rules must be disregarded, and the mere remark of a judge, in deciding a cause, having no reference to the issue, in conflict with the decree and the facts in issue found in the decree, wholly unsupported by testimony, false in fact, *in direct conflict with the admissions of record of the party pleading it, and outside of any issue in the cause*, must be taken as irrefragible truth.

If such a rule were adopted it would be dangerous to submit a cause to a court, the solemn admissions of an adversary, of record, and the entire absence of evidence and controversy, upon the trial, in regard to such fact, would be no protection against journal entries of the kind here relied upon.

Another objection taken is want of parties. This objection is not well taken.

If any such defect existed, it should have been taken by *plea or answer, it is too late to urge it for the first time at the hearing*, and *a fortiori* after the hearing and upon appeal.

Story *vs.* Livingston, 13 Pet., 359.

Segle *vs.* Thomas, 3 Bl. C. C., 11.

Tobin *vs.* Walkinshow, 1 McA., 26.

But there is no defect of parties. It does not appear that there are any other creditors of the railroad company, nor any other stock subscribers who have not paid their subscription, and if it did so appear this is not a bill to settle up the affairs of the railroad company, but to collect the amount due to the complainants on their judgments, for such a purpose the question of parties has been decided by this court in Ogilvie *vs.* Knox Ins. Co., 22; How. 380; 1 Bl. C. C., 232; 3 McLean, 580.

The defendants insist that S. and C. Howard, who are not here parties, were stock subscribers to a large amount, and that they should have been made parties, and that the other persons who recovered judgments in the Pepin case should also have been made complainants. In regard to the Howards being made defendants, because stock subscribers, little need be said. It is perhaps a sufficient answer to this suggestion to say *that the fact that they are stock subscribers is not*

stated in the bill, nor either of the answers or pleadings in the case. No such issue was made. Nor is it proved that they were indebted upon any stock subscription whatever. James Montgomery in his testimony, on pages 108 to 110 of record, states something about a subscription made by them, but he testifies it was made conditional, and was to apply on work, that the work and contract and subscription were all abandoned because the company could not comply. And all he pretends to state about it he states from the books, and the books were not offered in evidence, hence there was no legal evidence before the court on the subject.

In regard to the necessity of making Davis, Smith, Pepin and others joint complainants, because they also recovered judgments in the Pepin case, it is sufficient to say that it does not appear from the bill or any other pleading in this case, that any balance remains due to either of them upon their judgments. Their judgments were all taken in their own names, without the intervention of a trustee, and were several and not joint. There is nothing to show that such judgments have not been fully paid and settled. It appears also that nearly if not all of them are residents of Indiana, and those made defendants make no claim that any balance remains due to them. It appears also from their evidence that their judgments were taken for amounts greatly in excess of the several amounts their due. That the real indebtedness of the company to such of them as were directors, which included Pepin, Davis, Smith, McDonald, Wier, Montgomery, Lent and Applegate, was only $2,200 each, except to Pepin, who held a few of the bonds he received from Howard. And it distinctly appears from the record (see page 177 to 181 inclusive) that Pepin, Smith, Davis, Montgomery, Wier, Lent, Applegate and McDonald each recovered judgments for the sum of $1,800, at the April Term, 1868, of the Floyd Circuit Court. That such judgments were recovered upon what is known as the second mortgage, *and upon the same indebtedness to each of them, upon which they held the bonds as collateral security, on which their judgments were recovered in the Pepin case*

at the Nov'r Term preceding (see evidence of Judge Smith, page 104, ques. 11 to 14, and page 98, ques. 7). It further appears by this record that the real estate embraced in this "second mortgage" was ordered to be sold and the proceeds applied upon the judgments so rendered, and that execution issue to collect the balance due to the said several parties, after applying the proceeds of the real estate described in said mortgage. The amounts so found due to each of said parties was thus ascertained by the court, and judgments rendered therefor, and there is no pretense that these judgments have not been fully paid, and whether fully paid or not the indebtedness of the railroad company to them, and upon account of which they had been allowed to recover judgments, November 14th, 1857, in the Pepin case, became merged in such new judgments of May 13th, 1858, and such new judgments constituted the sole evidence of the indebtedness of said railroad company to said parties, and each of them. In view of these facts there is little excuse for saying that those judgment creditors should have been made complainants in this case. They have little right to stand in that position until they show that something remains due them on these new judgments, which no one pretends. But if these several persons were in reality judgment creditors, and entitled to enforce the several judgments standing in their names, recovered November 14th, 1857, in the Pepin case, there is no necessity of making them parties, either as complainants or defendants. A creditor is not required to state in his bill that there are no other creditors, nor make them all parties, if any there are. Different creditors of the same judgment debtor *may* unite in a bill for equitable relief of the same nature, but it was never heard of that they *must* unite.

It is a little out of order, at this point, but we cannot refrain from calling the attention of the court here to the record evidence furnished by the recovery of the above judgments of $1,800 each, May 13th, 1858, of the utter falsity and fraud of the claim that the complainants and other judgment creditors, in the Pepin case, received the lands described in the

first mortgage in full payment of the judgments so recovered. If that were true how did it happen that Smith, Davis, Montgomery, and other directors and officers of the railroad company, after applying upon the $2,200 and interest, each assumed for the company the proceeds of the sales of the lands embraced in the first mortgage, March 30th, 1858, (see record page 58) went on to recover judgments for $1,800 each for the balance remaining due them ?

If they had satisfied their indebtedness and taken the lands embraced in the first mortgage in full payment of their judgments in the Pepin case, as they make the journal read in the Lindley case, and now here insist, how can these honest officers and directors account for taking the second judgments, which show that the whole indebtedness to each of them was never but $2,266, and that after applying the proceeds of the lands, embraced in the first mortgage, there still remained due to them $1,800 each? We think upon the facts disclosed by this record the court will be able to do justice in this case without requiring the complainants to go back and join Smith, Davis and others as complainants. Their position as defendants may be embarrassing to them, but it is, considering the relation they have borne to this whole transaction, a much more consistent one than to be complainants. We will leave them where they are. We wish to conclude this point of defect of parties, either as creditors or stockholders, by calling the attention of the court to the fact *that it does not appear by the bill, or answers or evidence in this case, that there is one dollar of stock due from any person to the railroad company except the defendants in this case, or that the railroad company owes any person one dollar except the complainants.* And if it did so appear it clearly appears that there is enough due from the defendants to pay all the debts of the company and leave a large surplus, so that no injustice can possibly be done to any one by a decree that complainants shall be paid in full. And as this is not a bill to settle up the affairs of the corporation, but to collect the amount due the complainants, all necessary parties are before

the court. See Wood *vs.* Dunmer; 3 Mason, 308; and Ogilvie *vs.* Knox Ins. Co., 22; How. 380.

We think it clear that the complainants were entitled to the relief demanded, and that the circuit court erred in dismissing the bill.

S. BURKE,
AND
PORTER & HARRISON,
Solicitors for Comp't.

IN THE

Supreme Court of the United States.

JOHN P. PUTNAM AND OTHERS

vs.

THE CITY OF NEW ALBANY AND OTHERS.

Argument for Appellees.

M. C. KERR, *for Appellees.*

Pearson, Printer, corner 9th & D sts., Washington, D. C.

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vs.
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Appeal from the Circuit Court of the United States for the District of Indiana.

Argument for Appellees.

The questions presented in the record for discussion are not numerous. The decision of the court will turn upon the answer to a few of them.

HAVE THE COMPLAINANTS BEEN GUILTY OF FATAL LACHES?

I think they have, and that a few facts, apparent upon the face of the record, will render this truth impressively clear. The New Albany and Sandusky City Junction Railroad Company was not organized under a special charter or act of incorporation, but it was formed under the provisions of the general railroad law of the State of Indiana.—(1 Revised Statutes, by Gavin & Hord, pp. 504 et seq.) The corporation bears date from the filing of the articles of association by the original corporators in the office of the Secretary of State in September, 1853. Those articles contained the following proviso:

"Provided, however, and it is hereby understood, that if the City of New Albany, in its corporate capacity, shall hereafter take stock in this corporation to the amount of fifty thousand dollars or upwards, inasmuch as the pres-

ent subscribers, being residents of and owning property in said city, will then be under the necessity of contributing still further to the objects of the corporation by way of taxation, unless a portion of the present subscription is taken off their hands, the said city shall accept in part of the amount to be subscribed in its corporate capacity, at its par value, a transfer of any amount of stock now subscribed for by each individual over and above the amount of six shares, or three hundred dollars, which each such individual may desire or request shall be so transferred."—(Record, pp. 28, 86.)

On November 19, 1853, the City of New Albany subscribed for $400,000 of the capital stock of the railroad company.—(Record, pp. 62, 63, 64.)

On December 31, 1853, it was, at a regular and lawful meeting of the board of directors, ordered that "the original subscribers to the articles of association of this company be permitted, in accordance with the stipulations contained in said articles, to transfer any amount of the stock so originally subscribed by them, over and above the amount of six shares, or three hundred dollars, to the City of New Albany, said city having made a subscription to the stock of said company to the amount of fifty thousand dollars and upwards; and that the stock thus transferred be merged in the subscription already made by said city, so that the stock of said city, under her present subscription, with the stock so transferred, shall not exceed four hundred thousand dollars, as subscribed by her."—(Record, pp. 29, 87.)

On or before July 1, 1854, the individual subscribers or stockholders did in fact, in compliance with the condition contained in the original articles of association, and by virtue of the foregoing order and permission of the directory, transfer all their stock, save six shares each, to the City of New Albany. Each of the stockholders then fully paid to the company the amount of the six shares, long before the commencement of this suit, as full satisfaction of all claims against them by reason

of their original subscriptions, and the railroad company so accepted the payments.—(Record, p. 89.)

The original subscription by the city was supposed to be invalid by reason of defect of authority under the charter of the city to make it, and on February 21, 1855, a law was enacted by the State of Indiana empowering the common council of the city to ratify the subscription.—(Record, p. 65.) By an ordinance legally enacted on March 7, 1855, the City of New Albany did fully ratify the subscription.—(Record, p. 65.) That ratification, by relation back, validated the action of the city from the first.

Under the constitution of Indiana, and in fact, all laws for the organization of corporations in that state are public acts, and all acts or articles of incorporation are public records, open to the knowledge and inspection of all the people, and it results, as matter of law, that all the people are charged with at least general and constructive notice of the existence, the purposes, and the terms and conditions of the corporations of the state. This principle applies with still greater force and efficiency to all corporators and persons having dealings with any such corporation.

This action by the complainants was not commenced until January 29, 1868. Over thirteen years were allowed to elapse without complaint or suit. The complainants, or those under whom they claim, meanwhile had constructive notice from the public records of the state of the conditions in the articles of association, and that notice was at least sufficient to arouse their diligence and put them upon inquiry (31 Conn. R., 84; 1 Gall. R., 41); but they had also, through their agents and attorneys, actual notice of all that was done to carry out and perfect the stipulation in the proviso to the articles.—(25 Conn. R., 449; 2 McLean R., 376; 4 Wheat. R., 466.) None of these things were done in secret by the company or by these defendants. There was no effort,

or allegation or evidence of any effort to conceal the facts. The first bonds issued by the company bore date of September 20, 1854.—(Record, p. 59.) Thus it appears that this transaction was in fact *completed before* the execution of a single bond by the railroad company. Yet the ownership of some of these bonds, thereafter acquired by the complainants, is the sole basis of their cause of action. All these things were done by the company and the defendants in the utmost good faith, and at a time when the enterprise was yet in its inception, and when there was no motive for fraud. Indeed, fraud is not alleged by the complainants, nor proof of it attempted. When this cancellation and merger of stock took place, the company was full of hope and prosperity; no apparent dangers threatened it with embarrassment or failure, and insolvency had not yet been considered possible. The company owed no debts, had contracted no liabilities, had not yet contracted for the construction of the road, and was without question acting in all respects in good faith. At all times during these transactions the means of full and actual personal knowledge were open, ample, and complete, as well for the complainants as for these defendants.

This case was once before in this court, and so far as the demands of the complainants against the city of New Albany were involved, the case was fully adjudicated in New Albany vs. Burke, 11 Wallace, 98. It is submitted now, with the utmost confidence, that the grounds of decision in that case are applicable to this appeal, and are necessarily decisive against the complainants. The statements in the following extracts from the opinion in that case apply with singular force and exactness to the case at bar:

"The return of *nulla bona* to the complainants' execution against the railroad company was made on the first of December, 1858. Then their right, if any they had, to attack the compromise as fraudulent was perfect. Yet

they remained inactive more than nine years, and it was not until after a speculator had purchased a large part of the judgment that this bill was brought. An attempt has been made to excuse this long delay by the testimony of one of the complainants that he had never heard of the compromise of the city's subscription until a time which was subsequent to the commencement of the suit. But he does not say that he had not full possession of the means of detecting the fraudulent arrangement, if it was fraudulent, or that there had been any concealment; and the possession of such means of knowledge is, in equity, the same as knowledge itself."—(2 Story's Equity, §1521.)

"Moreover, the other evidence in the case is irreconcilable with this statement of the witness. He had attorneys who knew of the compromise from the first. He himself went to New Albany, in the spring of 1858, for the purpose of making a thorough examination of the affairs of the company, and another witness thinks he was then informed of the arrangement. There is not the slightest evidence that any other one of the complainants was not fully apprised of what had been done from the time of the transaction, and certainly they all had the fullest means of knowledge. No excuse is, therefore, shown for their long delay, and it is difficult to see why they are not barred by the rule in equity analogous to the statute of limitations. Upon this subject it is unnecessary to cite authorities. They are to be found in numbers in the decisions of this court, as well as elsewhere. It is not to be questioned that a direct suit at law, founded upon alleged fraud in making the compromise, would have been barred by the Indiana statutory limitation of six years. It cannot be maintained that supine negligence and lapse of time are less efficient in a court of equity."—(11 Wallace, 107.)

It is proper to repeat here, and to bear in constant mind, that those under whom the complainants claim, and from whom they derived their cause of action, if any they have, in this case, were subscribers to the stock of the company—were corporators—and therefore chargeable with full notice of all the conditions of the association and the action of the directory. The persons referred to, the original purchasers of the bonds which now

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form the basis of the complainants' action, were Charles and Sebra Howard. These gentlemen were subscribers to the capital stock of the company to the extent of $306,550.—(Record, p. 97.) The first bonds issued by the company were secured on real estate of the company in New Albany, which had been received upon stock subscriptions, and was not needed for railroad purposes. The company sold sixty-seven of these bonds to the Howards, who had become contractors to build the railroad. The Howards sold fifty-three of them to the complainants and those under whom they claim.—(Record, pp. 47, 48, 49.) It appears in testimony that Heman Ely, one of the persons who purchased these bonds of the Howards, from the time of that purchase, had acted in behalf of himself and of all the other bondholders, whose interests are now represented by these complainants, and that the title to all their portion of the lands bid in under the mortgage, was made to and held by him as trustee.—(Record, pp. 95, 96.)

The interest of Mr. S. Burke, the other complainant in this cause, was acquired in November and December, 1867, by purchase by him of A. H. Moss, S. J. & C. D. Andrews, E. & R. C. Dewitt, and Sarah Coit Day, who had been hitherto represented by Mr. Ely.—(Record, pp. 79, 80, 81.) The aggregate of the claims purchased by Mr. Burke, as fixed in the Pepin foreclosure in 1858, was $21,735. The evidence does not show the value of the lands in 1867 as compared with their value in 1858. The aggregate amount paid by Mr. Burke for these several interests, as stated by him in his deposition, was $5,500. It is believed that the lands alone, thus acquired by him, were worth at least $10,500. This much he secured at once and beyond any risk. He was, therefore, in a safe position to incur some hazards in litigation to recover the remainder of a stale claim. It seems not only improbable, but quite impossible, that he did not know at the time that the city's subscription had been compro-

mised ten years before, and that it was the general understanding of the real estate bondholders that they had received all that they were ever to receive on their claims against the railroad company, and that the whole subject of the railroad lands and mortgages was in litigation at the time in the Lindley suit. He says in his deposition: "I took the above assignments of judgments subject to all risks and unpaid taxes and assessments upon the real estate, and subject to the existing litigation at the time. The consideration above specified covered not only their interests in the judgments or bonds above specified, but also their interests in the real estate held in trust by Heman Ely."—(Record, p. 116.) Elsewhere in his deposition, Mr. Burke gives this significant explanation of the circumstances under which he was led into this speculation in stale claims: "I purchased upon the representations of others, and because I wanted a little outside business to occupy my leisure time, being at the time on the bench as judge of the court of common pleas and district court of Ohio, and having considerable leisure time."—(Record, pp. 116, 117.)

It is now contended by the complainants that the arrangement touching the individual subscriptions was fraudulent, both in law and in fact, and that neither the city nor the directors of the railroad company had any power to make it. The statute of Indiana on limitations requires that all actions for relief against frauds shall be commenced within six years after the cause of action has accrued, and not afterwards.—(2 G. & H., 156.) As no distinctions exist in Indiana between legal and equitable actions this statute refers to relief against frauds in every form of action. This provision is not understood to refer exclusively to cases where the cause of action arises directly out of the fraud complained of, but it relates as well to fraudulent contracts that would affect the enforcement of the pre-existing rights. The statute begins to run from the date of the fraud, no matter when it may

have been in fact discovered.—(30 Ind., 202; 33 Ind., 452.)

The Supreme Court, in the former decision of this case as against the City of New Albany, and in speaking of the arrangement between the city and the company and its creditors, touching the compromise with the city, say: "And we are not able to perceive that it was fraudulent, either in law or in fact. It may well be doubted whether the complainants can be heard in alleging fraud."—(11 Wallace, 105.) It is difficult to perceive any reason why this judicial suggestion does not apply with all its force to the case at bar. The general facts in the record and the relations of the parties to each other, in the one case, are scarcely distinguishable from the other.

If these complainants were dissatisfied with the cancellation and merger of portions of the individual subscriptions, or believed that transaction to be fraudulent in fact or in law, or considered it to have been made without authority of law and to be, therefore, void, why did they so long sleep upon their rights? Why did they so long acquiesce in its validity and continuance? It is trifling with the record and the evidence to assume that they had no knowledge or notice of its existence. Their *agreement of record*, in legal effect, confesses that they had full knowledge of the transaction from the first, and that it was made and conducted throughout in good faith, and that it was perfected long before their cause of action accrued, and that none of the individual subscribers interested were ever charged by the company with any part of their stock so disposed of.—(Record, p. 89.) It is urged with great confidence by the appellees that the complainants are forever barred by their voluntary laches against asserting any claim on account of that transaction. "A court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party had slept upon his rights and acquiesced for a great length of time. Noth-

ing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing."—(Smith vs. Clay, Ambler, 645.)

WERE THE CANCELLATIONS AND MERGER OF PORTIONS OF THE INDIVIDUAL SUBSCRIPTIONS VALID?

It is, however, alleged by the complainants that the reserved privilege in the original articles of association which, in a specified event, was to permit the subscribers to transfer portions of their stock to the City of New Albany, was illegal and void. It is also asserted that the arrangement, even if lawful and practicable, was in fact never legally or effectively executed between the parties. In reference to this arrangement, it is essential to just conclusions to bear in mind that it had its origin simultaneously with the organization of the company, and that it had its complete performance before the complainants' cause of action was brought into existence, and before any creditors had acquired any rights, claims, or equities against the company; and that in its aim, inception, execution, and motive it was absolutely free from taint or suspicion. The company was organized under general laws, whose primary and rational purpose was to facilitate the organization of such corporations and the accomplishment of their beneficent enterprises. The law should have such reasonable and liberal construction as would best promote the attainment of its ends in the interests both of the company and of the public. These ends will certainly not be promoted by holding that such articles of association as were filed in this case were null and void because they were conditional. The condition was not in itself vicious, or against public policy, or in any express terms or by reasonable implication forbidden by the statute. The state, whose corporation it was, made no complaint, instituted no inquisition to annul its corpo-

rate existence, but constantly recognized it as a valid and perfect corporation. The intent and purpose of the proviso in the articles are very apparent, and were, unquestionably, friendly to the full attainment of the objects of the corporation. New Albany was to be the southern terminus of the contemplated railroad. The subscribers to the articles were all citizens and tax-payers of the city. They were members of the municipal corporation. The organization of the company to construct the railroad was the result of popular agitation and enterprise in the city. They knew in advance, as well as such events can be foreknown, that the city would make the subscription it did make. They well understood that, if it did so, they would then respectively be called upon in taxation to contribute largely to pay whatever the city subscribed. Hence their natural and lawful desire, in that event, to reduce their individual subscriptions. These motives were frankly and honestly set forth in the articles of association and the latter were then made a public record.

The subscription by the city was made November 19, 1853. On December 31, 1853, the company, by its directory, ordered that the individual subscribers be permitted to transfer their excess of stock over six shares each to the city, and that it be *merged* in the subscription already made by the city. The stipulation in the articles was that "the city shall accept in part of the amount *to be subscribed in its corporate capacity*, at its par value, a transfer of any amount of stock now subscribed for by each individual over and above the amount of six shares." The meaning of all this is clear enough. It may not be expressed in the most artificial manner, but there is no ambiguity or mystery about it. It simply means that the individuals should be discharged or released from all their subscriptions over three hundred dollars for each, and that the subscription by the city should be held to embrace such amounts. The city, in a business and lawful sense, subscribed on the procurement of those

individuals, but in form it was necessary, under the law of the city, that the latter subscribe, rather than purchase, whatever stock it took, so that upon the books of the company the city stands as a subscriber, without reference to the transfers made to it by the individuals. That is, "the stock thus transferred was *merged* in the subscription already made by the city." This idea of merger not inaptly expresses the real intention of the parties. The estate in which a merger takes place is not enlarged by the accession of the preceding estate; and the greater or only subsisting estate continues, after the merger, precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged, and the lesser estate is extinguished. No formal release was needed. The transfers were actually made. The city subscribed $400,000. The remaining six shares for each subscriber were fully paid for. Thus the arrangment was completed. The true intent and meaning of the parties were carried into effect.—(Record, pp. 89, 96, 107.)

In view of all these facts, and with full knowledge of them, and of the undisputed *bona fides* of all the parties, it was that the complainants, on the final hearing in the circuit court, entered of record an agreement, whereof the following is a copy:

"*Agreement of record.*

"It was admitted by the complainants, on the final hearing, that all the defendants herein mentioned in the joint answer of Thomas L. Smith and twenty-seven other defendants transferred all the stock in said New Albany and Sandusky City Junction Railroad Company subscribed by them in excess of three hundred dollars to said city of New Albany, in compliance with the condition contained in said original articles of association, and that said transfers were so made before the first day of July, 1854, and that none of said individual subscribers was ever charged on the books of said railroad company, in respect of said subscriptions, with any stock in excess

of three hundred dollars. And it was further admitted by said complainants that each of said individual subscribers fully paid the sum of three hundred dollars, as called for by the railroad company, long before the commencement of this suit, intending the same as a full satisfaction of all claims against them by reason of their respective subscriptions to said articles of association, and that the same was so accepted by said railroad company; and also that they had in like manner fully paid for any and all other stock in said railroad company ever at any time subscribed by them or any of them."—(Record, p. 89.)

Yet in this court it is maintained by the complainants that the railroad company had no lawful right or power, as against creditors, to suffer the stock to be canceled and merged, and that as to them it is fraudulent. The general and proper duties of directors are not questioned by the appellees. It may well be conceded that the directory had no power to destroy the company, or to give away its funds, or to deprive it of any of the means to accomplish its purposes. The directors could not make a fraudulent or a voluntary conveyance. The legal duty of the directors is to apply the assets of the company to the payment of its creditors first, and for the benefit of its stockholders afterwards. In a general sense its stock notes or subscription roll, being a part of its capital stock, become a fund for the benefit of the creditors. To surrender this fund to the stockholders, without good consideration, is a violation of corporate duty, and a fraud. But these conceded general principles have not been contravened in any respect by the action of this company towards these appellees. The company has only carried out, in this behalf, one of the fundamental conditions of its own organization. The object of that condition was to secure, in part at the expense of these appellees, a much larger subscription than they desired to surrender. That larger subscription was secured. The company had the benefit of it, and so did the creditors of the company. It is not possible, therefore, without the aid of

an illogical imagination, to assume that there was fraud, in fact or in law, or in the secret intentions of the corporators, in the incorporation of such a condition into the original articles of association. A corporation, in the absence of any charter restriction or specific limitation upon its powers, has a clear right to entertain any conditions, and execute any stipulations, and make any dispositions of its property, or adjustment of its subscriptions, not forbidden by the general aim and spirit of the statute. In this case it would have been palpable bad faith, and grossly inequitable conduct for the company to refuse to carry out one of the essential conditions of its own existence.

The authorities chiefly relied upon by the complainants to sustain their positions are readily and clearly distinguishable from the case at bar. Their leading case is the Bedford Railroad Company vs. Bowser, 48 Penn. State R., 29. But that case utterly fails to sustain them, and was decided upon entirely different grounds, and is really not at all in point to serve them here. A brief statement of the material facts in that case will at once indicate its entire want of logical pertinence. In that case Bowser's subscription was under a special charter, the terms of which were absolute and unconditional, but he attempted to annex to his subscription certain conditions, and the court held his conditions nugatory and void. He attempted to defend against a suit upon his subscription by showing a concellation of his stock by order of the directory, but the proof established the facts that, when the cancellation was ordered, the company was greatly indebted, suits were pending against it to collect money due to builders of the railroad, and the company was otherwise embarrassed. When the charter was first granted, and at the date of Bowser's subscription, it required an aggregate subscription of $150,000 before letters patent could issue to the company, but afterwards it was so amended as to authorize the patent to issue upon the

subscription of $25,000, and Bowser claimed that this amendment released him from his subscription, and the proof showed that, after the amendment and the full organization of the company, he voted in right of his subscription, and the court held that by voting he admitted himself still a corporator, and that a corporator must be held to be cognizant of the terms of his own charter. But in the case at bar the facts were entirely different; the charter was under a general law, and was brought into existence by articles of voluntary association, and the fundamental condition in controversy was inserted in these articles, and the cancellation and merger of stock antedated all liabilities and embarrassments of the company, and was without taint of evil motive or purpose, and the canceled and merged stock was never voted after the cancellation and merger.

In the Bedford Railroad Co. vs. Bowser, the learned judge, in referring to the rejection by the lower court of certain evidence, said: "So, too, the proof of what took place when the resolutions (of cancellation) were presented and adopted should have been received. It tended directly to show that the action of the board was fraudulent and unauthorized, and that its purpose was not that which was avowed in the preamble to the resolutions." But, in the case at bar, there was never an allegation or claim on the part of anybody that there was any deception, or false pretence, or fraudulent purpose entertained by the directors. The court further say, in the case just named, that "directors of a railroad company are trustees for all the stockholders, and, in a very just sense, for the commonwealth. It is an abuse of their trust, wholly unauthorized, and at war with the design of the charter, to single out some of the stock subscribers and release them from liability." In the case at bar nothing of the kind was attempted; the stockholders at the time were all parties to the arrangement, save the city; the directory acted in the premises for all the stock-

holders; all the stockholders made transfers alike; there was no discrimination or favoritism towards any at the expense of others; the city had knowledge of the stipulation in the articles; it subscribed those articles with full notice and knowledge of the intention of the previous individual subscribers; it thereby assented to and approved the conditional stipulation therein contained; its subsequent ratification, under legislative authority, of its subscription to those articles, was also made with notice of the action of the directory; and thus, throughout the transaction, there is a total absence of unfairness, concealment, or evil purpose. Indeed, there is nothing in the record that likens this case in material respects to the one relied upon as authority.—(Record, pp. 29, 64, 65, 66, 89, 96, 107.)

Equally unavailable for the purposes of the complainants are the other cases cited by them. In the case of Mann vs. Cooke, 29 Conn. R., 178, there was an unauthorized attempt by the president of the company to release a subscriber from the obligation to pay his subscription, but the court find that "at the time the corporation was greatly insolvent, and its creditors had a right to insist that the capital should be kept good and no part divested or withdrawn." It is not needful here to review other citations of the complainants in detail. They do not touch the questions involved in this record.

It is further maintained by the complainants that the city had no corporate power or capacity to accept such transfers of the stock of the individual subscribers. The general action of the city in connection with its subscription, including its final ratification thereof, has already been reviewed by this court, and fully approved and vindicated by its judgment.—(11 Wallace, 96.) The true legal import of that arrangement was, not that the city would *purchase* the individual stock, but that the latter, over and above the amount of six shares for each individual subscriber, should be merged in or constitute a

part of the subscription by the city and the individuals be released therefrom. The city thereafter made its subscription with notice of this intention on the part of the company, and after becoming a stockholder, and having full knowledge of the action of the directory, and of the transfers of stock by the individual members, it made no objection or complaint, but fully acquiesced in what was done. The company in obtaining, chiefly through the influence of the individual subscribers, the large subscription by the city, secured what was many times equivalent to the surrendered and released individual subscriptions. In other words, the release was for a full and ample consideration, and the result was highly advantageous to the company, for without that express stipulation in the original articles, the individual subscribers would never have subscribed what they did.

Several of the officers of the city government were subscribers to the original articles of association, and the authorities of the city had knowledge that the individual stock was being transferred to the city under the provisions of the articles of association and the order of the directors. The mayor of the city at that time, Joseph A. Moffett, was also a director in the company, and he was present at the making of the order on December 31, 1853.—(Record, pp. 29, 96, 97.) At the same time William M. Weir, a member of the common council of the city, was also a director in the company, and was present at the making of the same order.—(Record, pp. 29, 69, 97.) At the same time, Augustus Bradley, John Bushnell, B. C. Kent, and James Pierce, all members of the common council, were also original subscribers to the articles of association.—(Record, pp. 29, 69, 97.) Is it rational to assume, in view of all these facts, and of the full and complete knowledge possessed by all these persons and officers, in their personal and official relations, that the city had no notice of the arrangement for the transfer of the individual stock, or did not with full knowledge

assent thereto and acquiesce in all that was done? In the contemplation of equity, is this fullness of knowledge on the part of the officers of the city to go for nothing? Here is a total absence of fraud, or proof or allegation of fraud, on the part of the city or its officers, or the company or its directors, in connection with this stock.—(30 Ind., 472; 38 Mo., 228.)

DID NOT THE CITY ASSENT TO AND RATIFY THE TRANSFERS OF THE INDIVIDUAL STOCK?

The law raises the same presumptions as to assent, acquiescence, and ratification against corporations as against natural persons. Where a corporation is sued for damages upon an executory contract, the plaintiff must show a contract legally binding upon the corporation; yet, where the plaintiff, with the knowledge of the officers of the corporation, has performed a contract made with one assuming to act as its agent, the corporation will be presumed to have ratified the contract, and will not be permitted to deny the authority of the agent.—(15 Barb., 323; 17 N. Y. R., 449.)

No express vote, or formal act, or ordinance is necessary to constitute a ratification by a corporation of an agent's act. A ratification may be inferred from corporate acts involving or implying a confirmation.—(27 Conn. R., 538; 12 Serg. and R., 256.)

Ratification of acts done in behalf of a corporation may be inferred from the acquiescence of the directors, or other governing body of the corporation; from the fact that, after the facts have been brought to their knowledge, they have taken no measures to show dissent.—(6 Vt., 528; 19 N. Y. R., 207; Dillon on Municipal Corporations, § 383 et seq.)

After a lapse of ten years, without objection from the board, a deed by the president of a bank on behalf of the corporation should be sustained, notwithstanding some

deviations from the order of the board of directors authorizing him to make it. A ratification may be presumed.—(5 Fla., 409.)

In the case at bar, the city, in order to assent to, approve, and ratify the full execution of the stipulation in the articles of association in favor of the individual subscribers, did not need to act by any solemn or formal order or resolution. It needed only to assent to the performance of the stipulation. The stipulation did not require the city to formally accept the transfers, and hold that identical stock, and then subscribe for enough more to make the $400,000. It only required the city to assent that the individuals might transfer all their subscriptions over six shares for each, and be thereby released from its payment, and that the large subscription of the city should, to the like amount, stand in its stead. It was a process of substitution of one subscription for another, with the full knowledge and assent of all the parties. The arrangement appears to be novel and quite without precedent, but it is not therefore unlawful or void, because it is not unreasonable or fraudulent. The admissions of the complainants relieve it of all suspicion of bad faith.—(Record, p. 89.)

The subscriptions made to the original articles of association were in no just, legal, or equitable sense *colorable* subscriptions, because, to constitute such subscriptions, an element of concealment, or of actual fraud, or of fraudulent distribution of stock, is essential.—(1 Redfield on Railways, 2d ed., pp. 8 and 69.) In such cases, on principles of fair dealing, equity denounces the secret agreement, or dishonest device to obtain unjust advantage, and refuses to enforce it, and holds the dishonest subscriber bound to do whatever the settled rules of equity require. (20 Vt. R., 509; 17 Ohio R., 187; 34 N. H. R., 124.) But in the case at bar there is a complete absence of any such element, and none such is charged in the complainants' bill, or attempted to be sustained by proof.

The principle of law which denies directors power to act in certain cases where they are personally interested, is in no degree violated by the conduct of the directory in this case. There was in this case no conflict of interests; the interests of all the subscribers at the time, whether they were directors or not, were identical, not antagonistic. There was nothing in the stipulation, or the circumstances surrounding the board, or the motives of individual directors, calculated in fact or law to beget any conflict between duty and interest. What they did was the mere execution, in the interests of all the members and of the company, of an open, *bona fide*, and legitmate covenant in the articles of association. They were invested with no discretion, but only charged with the performance of a specific duty. That was all. They made no profit, and gained no advantage for themselves above others.

But did not the State of Indiana sufficiently empower the city, by the act of February 21, 1855, to ratify its subscription, and to validate it, with all its conditions and incidents? The state should be charged with full knowledge of its own corporations, whether by special charter or voluntary association. In this case the company was formed by voluntary articles, which were made a public record, and the condition in question was a part of that record, and then and with knowledge the city subscribed to the stock of the company, and the individual stock-subscribers transferred their stock as stated, and after all these things, and on the procurement of the railroad company and the city, the state enacted the law of February 21, 1855. It is submitted that, in the subsequent ratification by the city, there was embraced all that had gone before affecting the rights and interests of the city in connection with the railroad company. This law was enacted and the ratification made with full knowledge of the condition and of the action of the company and of the city thereunder.

IS THE "AGREEMENT OF RECORD" OF THE COMPLAINANTS A PART OF THE RECORD IN THIS CASE?

That *agreement* is elsewhere set out at length in this brief, and needs not to be repeated here. It is a part of the record as made up and filed by the complainants in their appeal in this case.—(Record, p. 89.)

The "agreement of record" is certified by the clerk to be a part "of the record and proceedings in the cause."—(Record, p. 186.) The admissions contained in this agreement constituted a very material and indispensable part of the evidence produced and relied upon by the appellees on the trial of this cause in the circuit court. They were considered by that court and formed in great part the basis of its judgment against the complainants. It must be assumed the admissions were then made in good faith, and because they were known to coincide exactly with the facts as they had hitherto transpired. They were made for the sole and obvious purpose of waiving the necessity on the part of the appellees of making more formal proof of the same facts, and to hasten a trial in that court, which otherwise might have been deferred to a later day in order to obtain testimony to establish the same facts. They were made by the same counsel who now represent the complainants.—(1 Greenleaf on Evi., Redfield's ed., §§ 186, 205.)

It is therefore matter of profound surprise that the "agreement of record" is now seriously repudiated by them as forming no proper part of the record in this cause, and as having been improperly embodied in the record by the clerk on his own mere motion. Such professional ethics may well disturb the habitual reliance of counsel, in all the courts of the country, upon the good faith and honor of each other in the execution and observance of such agreements. Such agreements are matters of constant and daily occurrence. They facilitate the trial of causes and promote the ends of justice. They involve no excess of authority on the part of attorneys.

They become, when made and entered upon the record of the court, as this one was, for all practical purposes, part of the proceedings of the court and of its journal and record. The attorneys are officers of the court, as well as agents and representatives of the parties. The appellate tribunal, in a cause like the one at bar, in the absence of any agreement of this character which had been made by the counsel, filed, entered of record, and used on the trial in the lower court, would have an imperfect record, could not justly or intelligently review the case, and might do gross injustice in its conclusions. This cause was a proceeding in equity, not at common law, and the trial was by the court, not by jury. The agreement in question was submitted to the court on the trial and entered of record in the cause. There was no dispute in regard to the facts, and no ruling of the court on the admission or rejection of evidence. The facts were agreed upon by the counsel for the parties, and were carefully written down by them and entered on the record. There was, therefore, no necessity for a bill of exceptions to entitle the agreement to go into the record. It was voluntarily placed there by the parties.—(2 Abbott's United States Practice, 254-5; Phillips' Practice in Supreme Court of the U. S., ch. XIV.) "The office of the bill of exceptions is to bring up for review some objection, in point of law, to the opinion and direction of the court, upon a trial at law, or of the judge at *nisi prius*, either as to the competency of witnesses, the admissibility of evidence, or the legal effect of it; or of the overruling a challenge, or refusing a demurrer to evidence."—(Phillips' Practice, &c., 137.) There was no basis furnished in the trial of this cause below for the application of this law or rule. The citations of authorities in the brief of the appellants against the admission of this agreement into the record are insufficient and valueless to sustain the objection. They need no further examination, because their facts wholly distinguish them from the case at bar.

It is proper to add, before this question is dismissed, that the substance of the facts admitted in the "agreement of record" is elsewhere established by the testimony of the witnesses, Thomas L. Smith and James Montgomery.—(Record, pp. 96 and 107.) The evidence in the record on the points involved in the agreement is, with the aid of the admissions, conclusive against the claim of the appellants to reverse the judgment against them in the circuit court.

IF THE CITY NEVER ACCEPTED OR RATIFIED THE TRANSFERS, STILL, AS AGAINST THESE COMPLAINANTS, THEY WERE GOOD AS RELEASES.

They were executed in pursuance of a reserved right in the articles of association. They were based upon good and sufficient consideration moving from the individual subscribers to the company. The company must needs have other and larger subscriptions. The city of New Albany was able and might be induced to subscribe. All the individuals were also members, citizens, property-holders, and tax-payers of the municipal corporation. A large subscription by the city was equivalent to an additional subscription by each of the individuals. The efforts of the latter were necessary, and were relied upon to secure the municipal subscription. They did secure it. There was no element of collusion in these efforts. There was no abuse of confidence. There was no taint of immorality. There was no secresy. There was nothing upon which the purest equity could hang a single criticism concerning motives. The general welfare inspired all the parties. This is further evidenced by the fact that many of the released individuals afterwards subscribed and paid for additional stock.—(Record, p. 96.) These complainants, with knowledge of all these matters, admitted, and admit in this court, through the record in the cause, that the appellees transferred all their stock in excess of three hundred dollars, to the city

of New Albany, in compliance with the condition contained in the original articles, and that the transfers were made prior to July 1, 1854, before they acquired any interest whatever in connection with the company, and that not one of the individuals was ever charged on the books of the company, in respect of those subscriptions, with any stock in excess of three hundred dollars. These admissions are general, unqualified, and directly material, and should be taken most strongly against the complainants. The appellees are entitled to the full benefit of the specific facts admitted, and also of all just and legal inferences arising out of them. What are these inferences? (1) That the transaction was conducted throughout in good faith. (2) That the transfers were made to the city in accordance with the condition in the articles. (3) That when they were made the city had notice and assented thereto. (4) That these complainants, or those under whom they claim, had notice of these acts from the first. (5) That between the individuals who made the transfers and the company the transfers were considered final, effectual, and complete, and have been ever since so treated. It is confidently urged that these conclusions against the complainants are severally supported and justified by the admissions.

But the complainants do not stop with the admissions indicated. They go further, because they knew the facts justified them, and because the defendants would have made overwhelming proof if they had declined to make the admissions. They additionally admit, that each of the individual subscribers fully paid to the company his untransferred stock, long before the commencement of this suit, "*intending the same as a full satisfaction of all claims against them by reason of their respective subscriptions to said articles of association, and that the same was so accepted by the company,*" and that the several appellees did in like manner fully pay for all other stock taken by them in the railroad company after their original subscriptions. Apply-

ing the same rule to these admissions, it results that the legal inferences above indicated are greatly fortified, and, that, as between the company and the appellees, the transaction was considered to operate, in legal effect, as a final and perpetual release of the individuals from the payment of the transferred stock, and the acceptance by the company of the city's subscription, to that extent, as a compensation for the release. It is further fairly inferrable, both in law and equity, that all these acts and things were done without objection, dissent, or protest from the complainants or their predecessors in interest. That they were chargeable with notice, or had actual notice at the time of these transactions, is elsewhere shown in this brief. It is, therefore, submitted that the complainants are now estopped to demand the relief they seek in this appeal, not only by their laches, but equally by their conduct in other respects.—(12 Wallace, 681; 4 Blathef., 1; 10 Peters, 257.)

There are other questions discussed in the brief of the appellants to which, if time permitted, attention would be here given. But I am for the present compelled to omit remarks upon them. I am more willing to do so, because there is little room to doubt that the points upon which the decision of the court will turn have already been considered in this brief.

For the reasons already assigned, it is very respectfully submitted that the decree of the Circuit Court should be affirmed.

M. C. KERR,
for Appellees.

JOHN P. PUTNAM, ET AL.,

vs.

The New Albany and Sandusky City Junction Railroad Company, et al.

SYNOPSIS OF ARGUMENT AND RECORD, AND POINTS.

1. The statement of the facts of the case as in the printed brief and the errors relied upon.

In addition to the statement of the facts, as contained in the brief on file, it should be stated that there is no proof whatever that any assignment, even in form, was made or attempted to be made by any one of the defendants to the city; that the only evidence of any assignment in fact or in form consists in the unauthorized certificate of the Clerk as to what was admitted on the final trial.

In connection with the statement of the facts, the attention of the Court should also be called to the statutes of Indiana in force at the time this Rail Road Company was organized and these defendants became subscribers to its stock. This Company was organized under the general Rail Road Laws of Indiana, approved May 11th, 1852.—[*1 Gavin & Hord 504.*]

The first section of that law provides that "whenever stock to "the amount of at least fifty thousand dollars, or one thousand "dollars for each and every mile of the proposed road shall "have been subscribed, the subscribers to such stock shall "elect directors for such company from their own number "* * * Each of the subscribers to such articles of "association shall state his place of residence and the number "of shares taken by him in such company."

Sec. 2 provides that "articles of association formed in pur- "suance of the foregoing section shall be filed in the office of "the Secretary of State, and thereupon the persons who shall "have subscribed the same, and all persons who shall from "time to time become stockholders in such company, and "their successors, shall be a body politic and corporate in "perpetuity by the name stated in such articles of association."

Sec. 10 [do. 508] provides that "the stock of such compa- "ny shall be deemed personal estate and shall be transferable "in the manner prescribed by the by-laws of the company; "but no shares shall be transferable until all previous calls "thereon shall have been fully paid in or the shares shall have "been forfeited for the non-payment of calls thereon."

Sec. 38 [do. 517] provides that "*the stockholders shall bc* "*individually liable for all labor done in the construction of said* "*road that shall remain unpaid after the assets of the corpora-* "*tion shall have beeu exhausted.*"

The act establishing general provisions respecting corporations [*1, G. & H. 269, Sec. 3,*] provides that shares shall be numbered in progressive order, beginning at number one, and every stockholder shall have a certificate, under the seal of the corporation, signed by the Treasurer.

Sec. 7 of this act provides that "if any part of the capital "stock of such company shall be withdrawn and refunded to "the stockholders before the payment of all the debts of the "company, all the stockholders of such company shall be "jointly and severally liable for the payment of such debts."

Sec. 10 [do. 270] provides that "a book shall be kept by "the corporation at their office or principal place of business,

"containing the names of the stockholders thereof alphabet-
"ically arranged, showing their respective places of residence
"and number of shares held by them severally, and the time
"they became owners of the same, which book shall, at all busi-
"ness hours of the company be subject to inspection of cred-
"itors, stockholders or their representatives, who shall be per-
"mitted to take extracts trom the same."

Sec. 11 provides severe penalties against the company for the non-performance of the duties enjoined by section 10.

It is conceded in this case by the answer, and clearly established by the testimony of the defendant, Thomas L. Smith, and others, that none of the shares of stock which we seek to reach in this proceeding were ever entered upon the books of the Company; that none of this stock upon the books of the Company or otherwise was ever charged to any one of the defendants, or to the City of New Albany.

It is also conceded in this case that S. & C. Howard took the contract for the construction of this road and that they were the only contractors; that the bonds, for which the judgments were recovered, which we now seek to collect, were turned out to them in settlement or payment for work done upon the road in its construction.

2. John Kneffley filed no answers, but as to him the bill stood on default.—[*See Record, 7 and 10.*]

3. The names of the directors, who are defendants and who claim to have been released by their own vote and the condition or proviso in the articles of association, are Thomas L. Smith, James Montgomery, John S. McDonald, John B. Winstandley, and John S. Davis.

CONDENSED STATEMENT OF GROUNDS FOR EQUITABLE RELIEF.

1. The judgment taken in the names of Pierson & Seymour, Trustees, Nov. 14, 1857, record p. 34, for the use of Putnam, Day, Andrews, Ely & Ely, G. R. & H. C. Starr, R. C. DeWitt, E. DeWitt, A. H. Moss, in all $54,855 00. The mortgaged premises were ordered to be sold by a Master.

2. March 30, 1858, the property was sold [*Record 53*] and proceeds applied on judgment and execution awarded for the balance.—[*Record, p. 58.*]

3. Execution was issued to collect this balance August 6, 1858, and returned *nulla bona* December 1, 1858.—[*Record pp. 66 and 67.*]

4. None of the complainants were parties to the original judgments taken for their use.

5. The bonds upon which the judgments were taken were not in court at the time the judgments were rendered. The bonds bore date Sept. 20, 1854, and fell *due January 1, 1865.* —[*Record p. 59.*]

6. The bonds were delivered to the Howards, contractors of the whole line, for work done in constructing the road.—[*Record 47 and 93, Ans. 4 and 6.*]

7. The complainants, and those under whom they claim, were non-residents of Indiana when the judgments were rendered and still are. They held the bonds from Howard for a full and adequate consideration.—[*See Record, p. 47.*]

8. None of the complainants owned any stock in the Railroad Company.

9. On the 19th of February, 1863, William Lindley, a bond holder, commenced in the Floyd Circuit Court a suit for a new foreclosure of the mortgage to Pierson and Seymour, making them all purchasers under the first foreclosure and all bondholders, including complainants, parties defendants.—[*See Record, p. 119.*]

10. This Lindley suit continued in court until the 18th day of February, 1868, five years, and until this suit was commenced. [*Record 119.*] The complainants and those under whom they claim resisted this new foreclosure.—*See Record, pp. 124, 130–132.*]

11. John S. McDonald, James Montgomery, and many others, demanded a new foreclosure of the mortgage.—[*Record, pp. 132 and 133.*]

12. The first foreclosure and judgment were sustained in the Lindley case.—[*See Record, p. 166.*]

13. The amount found due to the complainants by the United States Circuit Court of Indiana, July 1, 1869, was $70,116 00. [*See Record, p. 32*]. This finding is conclusive as to the amount due complainants, leaving the only question here whether defendants are indebted to the Railroad Company.

The foregoing facts are relied upon to show complainants' right to come into a court of equity to reach the equitable assets of the Railroad Company.

CONDENSED STATEMENT OF GROUNDS OF LIABILITY OF SMITH AND OTHERS.

The defendants are claimed to be indebted to the Railroad Company and bound to answer here upon the following facts:

1. August 22, 1853, under the general railroad laws of Indiana they formed and organized the N. A. & S. C. J. R. R. Co., and subscribed to its capital stock the several amounts stated in the bill. This fact is admitted.—[*The Record, pp. 25, 27 and 28.*]

2. They have not paid for the stock subscribed by them. —[*See Ans. pp. 22 and 26.*]

3. No one else has paid for this stock *nor assumed to pay for it.*

4. There were fifty-five original subscribers, the aggregate amount of their subscriptions was $148,750 00.—[*See Record, p. 29.*]

5. The statute of Indiana required that $50,000 00 at least, or $1,000 a mile should be subscribed before organization. [*1 G. & H. 504.*] This road was to be 110 miles long. [*See Record p. 28.*] If the conditions in the articles of association are valid, and the subscriptions were for only $300 each, then but $16,500 00 was really subscribed. But the articles contemplated some one should have the stock. The defendants agreed "*to subscribe and pay for*" (not $300 each) but "the "amounts set opposite their respective names."

6. The statute [*1 G. & H. 270*] provides that a book shall be kept which shall contain an alphabetical list of all stockholders, &c., and also provides penalties for neglect of this duty.

7. The Company did not put upon its books any account of the above $148,750 of stock except $300 to each subscriber.—[*Record pp. 26, 89 and 90, Ans. 31.*]

8. There is no evidence that any transfer of any of this stock was made to the City except the unauthorized certificate of the clerk.—[*See Record, p. 89.*]

9. If this certificate is to be taken instead of the decree which shows the case was heard on bill, answer and evidence, still no valid transfer is proved, for confessedly no stock standing in the names of defendants was transferred to the City. [*See Record, pp. 26, 89 and 97.*] The answer claims only that the Railroad Company accepted the City "subscrip-"tion and contract for $400,000 in full of defendants' liability," &c.—[*See Record, p. 26.*]

10. The defendants do not claim that the complainants knew of or assented to their peculiar assignment. There is no proof that they did know of it but positive proof they did not.—[*See Record, pp. 85, Ans. 13.*]

11. Stockholders in Indiana are personally liable for all debts incurred in constructing the road after the assets of the Company are exhausted.—[*1 G. & H. 517, Sect. 38.*]

12. Debts and demands upon contracts in writing are barred in twenty years from the time the cause of action occurred.—[*2 G. & H. 159.*]

CONDENSED STATEMENT OF THE LAW POINTS IN THE CASE.

In the case of Ogilvie and others *vs.* Knox Insurance Co. and others, *22 Howard, p. 380,* which was a case very nearly resembling this. It was like it in this at least, that it was a creditor's bill predicated upon sundry judgments rendered in favor of the complainants *in the State Circuit Court of Indiana*

for Knox County, and the property sought to be reached was the unpaid subscriptions of the defendants who were subscribers to the stock of the Insurance Company. Various defenses were set up, among others that the subscriptions were procured by fraud.

Judge GRIER delivered the opinion of the court, and in a few words stated the rule of liability in such cases, saying, "the defendants, as stockholders who have not paid in the "whole amount of the stock subscribed and owned by them, "stand in the relation of debtors to the corporation for the "several amounts due by each of them. As to them this bill "is in the nature of an attachment in which they are called on "to answer as garnishees of the principal debtor. Where a "number of special partners are incorporated to carry on the "business of insurance, *the stock subscribed and owned by the "several stockholders or partners constitutes the capital or fund "publicly pledged to all who deal with* them" * * * *"The ninety per cent. retained by the stockholders is as much a "part of the capital pledged as the cash actually paid in. When "that portion of the capital represented by these securities is re-"quired to pay the creditors of the Company, the stockholders "cannot refuse the payment of them unless they show such an "equity as would entitle them to a preference over the creditors if "the capital had been paid in cash."*

The rule here srated so clearly needs no further authority in this court to command respect and recognition.

From the above statement of facts it clearly appears that the complainants are judgment creditors of the Railroad Company, and that there is now due to them $70,116 00 and interest from July 1, 1869. That the money cannot be made by execution, and that Thomas L. Smith and his associate directors and stock subscribers should respond in this case unless they have been released from their obligations by reason of the facts stated in the answer and established by the testimony.

There is no question about their original liability, confessedly they subscribed for and agreed *"to pay for the amount "of stock set opposite their respective names."* Confessedly they

did not pay for it as agreed, and unless they have been released from their obligations assumed they are still liable. Have they been so released? We say they have not.

They claim a release by virtue of the condition or proviso in the articles of association and the resolution of the Board of Directors of December 31, 1853, and the transfer of their subscriptions or stock to the City of New Albany in pursuance thereof.

Here the onus is on the defendants and they must show a valid release.

We claim *first* that no release or assignment to the City is proved.

Second. That if proved precisely as alleged it did not discharge the defendants from their obligations to pay their subscriptions; several reasons might be given for this position:

1. That neither the proviso in the articles of association nor the resolution of the Board of Directors shows that they were to be released.

2. That the conditions attached to the articles of association are void in the light of the statute [*1 G. & H. 504, 517 and 267 to 269*, and the decisions of the courts, *32 Pa. State R. 234–34, do. 358 and 455, 48 do 29, 29 do. 146; 10 Simmons 519; 11 do. 437; 10 Law J. N. S. Ch. 73.*

3. The resolution of the directors is void. It clearly contravenes the spirit of the statutes above cited, if not their word, and is in conflict with the decisions above cited, and also, *35 Mo. 15; 15 B. Monroe, 218; 15 How., 304; 29 Conn. 178; 19 John, 456; 16 Conn. 593; 6 Hill, 624–9.*

[*1 Eng. ch. appeal case for 1860, pp. 160 and 511; 27 L. & E. 572; 39 do. 576; 34 N. Hamp. 124; 54 Eng. Ch. Rep. 284*, and many other authorities cited in brief.]

4. The resolution is void because *ultra vires.* See above cases.

5. Void because every director was interested in its passage. As directors they could not release themselves. They could not serve the Company and themselves at the same time. See cases p. 14 of brief.

6. Such a resolution is void as an attempt to withdraw from the Company the very capital which the legislature provided should be subscribed before corporate powers could be exercised.

7. There is no reported case to be found where any Court has held a condition or proviso of the character here relied upon valid. Nor any case holding such a resolution passed by a Board of Directors so interested valid. Nor is there any case holding that such a transfer of stock will release a subscriber. Nothing less than a *bona fide* transfer, and substitution of the transferee to the position of the subscriber, will operate as a release from liability. No simulated, unreal transfer, which places the transferee under no obligations on account of the transfer, will relieve the subscriber from his obligations. It never has been held that anything less than an actual substitution of the transferee to the place of the assignor, with the assent of the creditor, will have such an effect.

8. The record, as we have seen, [*record, pp. 63, 64 and 65*] simply shows that the City subscribed for $400,000 00 of stock, payable in its bonds, and there is not from first to last, in the records of the city or the records of this case, any evidence that the question of the assumption of the subscriptions of the defendants ever came before the Common Council of the city.

Indeed it is not claimed in the answer. It is only claimed that the City, in making its subscription for $400,000 of stock in November, 1853, assumed the payment for stock which was transferred to it some time before July 1, 1854, under a resolution adopted December 31, 1853.

If the City ever assumed the debts of any of these defendants for stock it did so months before the transfer was made and by a contract in writing which is only a plain contract to take stock. Such a position is simply absurd. By this arrangement the city stood ready to take all the stock the subscribers might desire, or take none and all by the same act and instrument, and that instrument entirely silent on the subject. All the subscribers had to do to be relieved from the

payment of their subscriptions was to throw them over to the city, and by this simple process both the city and the subscribers would be relived from an unpleasant burden, and the creditors for whose security the legislature required this capital to be subscribed, would find themselves victimized. Such an arrangement beats McCawber's idea of paying an old debt with a new note. It saves the trouble and expense of executing the note.

9. If there was in fact no formal assignment to the City, then the defendants are each indebted to the railroad company as alleged in the petition on demands arising upon contracts in writing, not barred by any statute of limitations, and of course they are bound to respond in this action. And the unauthorized certificate of the clerk does not prove that the alleged assignment was made to the city. See brief, pp. 7 and 8.

10. What constitutes such a transfer of unpaid stock as will release the subscribers from their liability to the company?

This company as we have seen by the statute was required to keep a book at all times, showing who owned stock and how much and when it was acquired, and doubtless transfers of such stock regularly made and accepted would be good if approved by the directors acting in good faith. But a transfer or writing, or signing a paper or a book showing that the stock subscribed standing in the name of the subscriber is assigned to a third person without showing that he was substituted for the assignor, is no transfer and does not relieve the assignor from liability.

"A mere assignment of his share by a subscriber does not "relieve him from liability until the assignee is substituted in "his place."

Pierce on Railways 77. 13 Ill. 516; 1 Kernan, 102; 11 Alab. 451; 12 Conn. 530; 3 Sandf. ch. 498; 5 Gill. 484.

The proviso in the articles of association is null and void. The statute required a certain amount of stock, not less than $1000 a mile, or $50,000 in all, to be absolutely and uncondi-

tionally subscribed as a condition precedent to the election of officers and the exercise of corporate powers.

1 Gavin & Hord, 504, 48 Pa., S. Rep. 29.

The organizers and promoters of the company could make no conditions that would defeat this plain provision of the statute. But the alleged provision here is not even a condition, it provides what the city shall do in case it subscribes for stock. Here again the statute is encountered, for the city had no power then to subscribe for stock, and never acquired any such power. When the city acquired power to ratify illegal subscriptions that power was special and limited. (Record, pp. 65.)

11. The resolution (p. 29 record) of December 31, 1853, is in effect an attempt to release the directors and others from their liability without consideration. It is void. See brief, pp. 4, and 8 to 15.

12. A release upon such grounds rests upon no solid equity. The stock subscribed takes the place of the individual liability of the incorporators, and of necessity it cannot be withdrawn until all corporate liabilities for which it stands pledged are discharged. The creditors have not only a legla right that it shall not be withdrawn, but they have the strongest possible equity that their debts shall be paid. *This debt was incurred in construction of the road.* Against such a debt there is no rule of equity that would allow of the withdrawal of the capital stock required by the legislature.

13. *This is not a case of fraud. The case depends upon the contracts of the defendants. If their attempted release is tainted with fraud, and therefore invalid, that has nothing to do with their liability on their contracts. It don't affect us, we had nothing to do with the attempted release and no notice of it.*

" *It is the amount of shares subscribed* and not the sums ac- " tually paid in which constitute the capital stock of a company." *Hightower v. Thornton, 8 Ga. 486. 22 Howard 380, and cases above cited.*

" A corporation cannot make a valid agreement with one " who delivers to them securities to form a part of their origi- " nal capital and going to make up the amount of such capital

"required by law, that they will subsequently surrender the "same for a less security which will not meet the require- "ments of the law. Such an agreement is a fraud upon the "law, and the surrender and cancelling of such security in "pursuance of the agreement does not release the liability of "the one who gave it to the corporation." *11 Abbott Pr. 389. 23 How. Pr. 109. 5 Jones Eq. R. 395.*

"A railway company incorporated by act of Parliament is "bound to apply *all the funds* of the company for the purposes "directed and provided for by the act, *and for no other purpose "whatever.*" *7 L. & Eq. 505; 21 Law Jurist N. S. 23; 11 C. B. 775; 16 L. & Eq. 180; 18 L. B. 618; 22 Law J. U. S. Q. B. 69; 17 Jur. 21.*

"Accepting a surrender of stock in payment of securities "held by the corporation as a part of their capital is a fraud "upon stockholders and creditors, and is a withdrawal of capital "within the statute." *Johnson v. Bush, 3 Barb. ch. 207; 9 Paige 152.*

"When a subscriber has taken a number of shares and paid "a part of the installments thereon, an agreement is not valid as "against creditors and other stockholders by which the amount "paid is acknowledged by the officers of the company as a full "receipt for a less number of shares, whose par value is equal "to the amount already paid on the whole number, and he is "also released by them from all liability for remaining shares." *Mann v. Pentz, 2 Sandf. ch. 257; Mann v. Currie, 2 Barb. 294; Mann v. Cooke, 20 Com. 178; 69 Maine 601; 19 Law Rep. (Oct. 1856) 342.*

"The creditors of an insolvent railroad company may have "their claims against it adjusted in equity, and the debts due "to the corporation and the amount of the subscriptions not "paid in subjected to their satisfaction." *Pierce on Railways, 510; 11 Alab. 437; 6 Sm. & M. 513; 8 Geo. 486; 4 do. 377, and cases cited in brief and above.*

14. The defendants charge that the indebtedness upon which we sue was contracted after their peculiar assignment and alleged transfer to the city.

We don't deem this fact very material, for the directors

have no more power to release stock subscribers without payment, as against past than future creditors, as we have seen, they have no power to destroy the company or give away its assets, or deprive it of any of the means of accomplishing the full purpose for which it was created. But the fact is not as alleged. The bonds sued upon were the obligations of the company to pay money. They were turned out to the Howards in payment or settlement of the amount due upon their work in constructing the road.

See evidence of Thos. L. Smith, p. 92, of Record, ans. 5. Ans. of Howard, p. 47.

There is no proof when the Howard contract was made, but it must have been very early in 1854, for March 7, 1855, a committee appointed by the City Council to report upon the question of ratifying the subscription of the city, reported that when the subscription of the city had been decided to be invalid, appeals were made to the citizens to take stock to enable the company to put the road under contract, and by the aid thereof the whole line was put under contract.—[*See Record, p. 69.*]

All of these subscriptions were made before June 5, 1854. —[*See Record, p. 71.*]

The Howards contracted for the whole line.—[*Ev. of Thos. L. Smith, p. 97, q. 33.*]

The *onus* of showing that the transfers were made before the debt was contracted, if material, is upon the defendants. They have failed to prove such to be the fact.

Whatever may be the fact about this matter, there is no doubt that whether a transfer was nominally made to the city or not, such transfer carried no stock, and was not intended to carry any over to the city. No part of such stock was ever charged to any original subscriber whether he transferred his stock or not. [See so-called agreement of record, p. 89, ans. 31, p. 97, by Thos. L. Smith; also answer of defendants, p. 26.

This shows a deliberate attempt to suppress the original subscriptions and to make some $16,500 answer the law,

which required $1000 a mile for 110 miles of road, or at least $50,000 in any case before organizing.

This stock which we seek to reach always stood in the name of the defendants, so far as it stood in the name of any one, and never in the name of the city. As creditors we may look to the person in whose name the stock stands. *1 Kernan 148; 5 Barb. 210; 6 Hill 624.*

This stock from the time it was subscribed stood in the name of somebody. It never stood in the name of the city, was never accepted by the city. [See 5 Sm. & M. 428.]

15. The defendants and their associates subscribed $148,750 of stock upon the articles of association before filing the articles in the office of the Secretary of State. *This was a cash subscription* made in compliance with the statute. If the city subscribed for any stock it subscribed for $400,000 payable in bonds. The two together made $548,750. There were 55 subscribers to the articles of association. If these subscriptions are cut down to $300 each, and "merged" in the city subscription they get off by paying $16,500, which takes $132,250 of cash subscriptions from the capital stock, which is lost to the company and its creditors.

III. There has been no delay in fact in instituting this suit. All apparent delay, so far as these defendants are concerned, is satisfactorily accounted for. [See brief 16 to 21.]

IV. Objections answered:

1. No money judgment. (Brief 21 to 22.)
2. This court has no jurisdiction. (Do. 22.)
3. We have a remedy at law. (Do. 23.)
4. Precluded by the judgment. (23 to 34.)
5. Defect or want of parties. (Do. 34 to 36.)
6. Falsehood of alleged compromise. (36 to end.)

7. The decision in the case against the city does not aid the defendants that release depended on special circumstances, and the act being a public one the court held we must take notice of it. There were no special circumstances here, and no pretence of notice. If these defendants could release the city, and then themselves, who will pay the debts of the Company?

This case is clearly distinguishable from the case against the City tried below at the same time. This Court held that compromise good on three grounds.

1. There was at the time of the compromise a *bona fide* question pending in the Courts as to whether the City ever legally subscribed for stock—that such stock rendered the bonds of the City utterly unsalable—making the case a strong one for a compromise.

2. The complainants were bound to take notice of a public act of that character published in the papers, and not having promptly taken measures to set it aside, must be presumed to acquiesce therein.

Both of these elements are wanting here. Here there was no question about original liability—no dispute existing *bona fide* to be settled. No presumed acquiescence on complainants' part, no publication in the papers, but an actual keeping off from the liability ledger the stock subscribed by these defendants.

8. There is no equity that compels a man to find that another owes his debtor, and bring suit within a shorter time than the statute allows to bar such debts.

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